TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1905.

No. ~~302~~ 51.

THE UNITED STATES, APPELLANT,

vs.

THE UTAH, NEVADA AND CALIFORNIA STAGE COMPANY.

No. ~~303~~ 52.

THE UTAH, NEVADA AND CALIFORNIA STAGE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Filed June 23, 1904.

(19402 AND 19403.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 302.

THE UNITED STATES, APPELLANT,

vs.

THE UTAH, NEVADA AND CALIFORNIA STAGE COMPANY.

No. 303.

THE UTAH, NEVADA AND CALIFORNIA STAGE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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1 I.—*Petition.*—*Filed December 24, 1895.*

In the United States Court of Claims.

THE UTAH, NEVADA AND CALIFORNIA STAGE Company, claimant, vs. THE UNITED STATES. } No. 19738.

To the honorable the Justices of the Court of Claims:

The above-named claimant, the Utah, Nevada & California Stage Company, respectfully represents:

I.

That it is a corporation duly organized and existing under the laws of Utah, having its principal office in the city of Chicago, in the State of Illinois.

II.

That, on or about the 15th day of September, 1892, the then Postmaster-General of the United States, the Hon. John Wannamaker, acting on behalf of the United States, advertised for proposals for carrying the mails in covered regulation wagons, of the kind prescribed by the Post-Office Department as the "covered regulation wagon mail messenger, transfer and station service," in the various cities, and, among
2 others, in the city of New York, in the State of New York, a copy of which said advertisement is hereunto annexed, made a part hereof and marked "Exhibit A."

III.

That at the time of the publication of said advertisement for proposals by the Postmaster-General as aforesaid, the service referred to, and hereinafter more particularly described, involved a mileage transportation of the mails of 1,033,298 miles per annum, and that at the time of the issuing of said advertisement, and as a part thereof, bidders were notified that the probable annual increase of this service would amount to the number of miles set forth in the paper hereto annexed, made a part hereof, and marked "Exhibit B."

IV.

That, in connection with said advertisement, among other things, the said Postmaster-General, so acting as aforesaid, issued certain instructions to bidders, the 27th paragraph of which is as follows:

"27. Bidders are requested to use the blanks for proposals furnished by the Department, which may be obtained at the post-office on each line herein advertised. For information relative to the service and its requirements bidders are requested to apply to the postmaster at the city where the service is to be performed."

That, pursuant to this instruction, claimant, who was contemplating making a bid for the performance of the service hereinafter particularly

set forth, made application to the postmaster of the said city of New York for information regarding the service to be performed in that city, and its requirements, present and prospective, and received no information in respect of any prospective service other than that contained in the estimated increase thereof, hereinbefore referred to, and made Exhibit B to this petition, and which said estimated increase amounted to about 555 miles per annum.

V.

Claimant further represents and shows to the court, that pursuant
3 to said advertisement, so issued, as aforesaid, by the Postmaster-General, and to the said information so given in respect of the probable increase of the service to be performed in said city of New York, claimant made and filed with the Department, a proposal for the performance of said service, consisting of carrying the mails in said city of New York, as aforesaid, for the period named in said advertisement, to wit, from the 1st day of July, 1893, to June 30, 1897, inclusive, naming as the compensation to be received by claimant therefor the sum of $192,000 per annum; that claimant was the lowest bidder for the said service; that its said bid was duly accepted by the Department, and that thereafter, to wit, on the 21st day of December, 1892, claimant entered into a contract with the United States for the performance of said service during the period aforesaid, which contract is hereunto annexed, made a part hereof, and marked "Exhibit C," and that, ever since the said day 1st day of July, 1893, claimant has been engaged in the carrying of the mails aforesaid under and pursuant to said contract, and still is so engaged.

VI.

Claimant further represents and shows to the court that thereafter, to wit, on the 25th day of August, 1893, less than two months after the performance of said contract was commenced as aforesaid, the said Postmaster-General, acting on behalf of the United States, caused to be created a new distribution station at Forty-fourth street and Lexington avenue, in most respects and virtually a second general post-office, in said city of New York, the performance of service to begin at said station on the 1st of September, 1893, and that claimant was required to perform the additional service created by the establishment of this new station; that, by reason of the establishment of said additional station, the said service was increased to the extent of 393,162 miles per annum.

That on the 24th of October, 1893, the said Postmaster-General, so acting on behalf of the United States as aforesaid, further increased the service aforesaid to the extent of 9,921 miles by the establishment of an additional station at the Industrial Building, in said city, and
4 demanded that claimant perform said additional service; that the aggregate of the increase of the service aforesaid within 120 days from the date of the commencement thereof under said contract was 413,604 miles per annum; that this increase of service occasioned an enormous additional expense to claimant—in the mere matter of ferry tolls alone involving an expense of more than $8,500 per annum; that

this is an increase of service that is entirely out of proportion to anything contemplated at the time of entering into said contract, and of which claimant had no previous knowledge or information other than that furnished by said estimated probable increase of service hereinbefore set forth, and hereto attached as Exhibit B.

"That this increase of service also occasioned an enormous additional loss to the contractor and claimant in this, viz, that the schedule for said service required by the Government required in its performance fast time in excess of the time fixed in the original schedules, and also in excess of the limits fixed by the ordinances of the city, and by law for wagon service in the city, including therein especially losses by the destruction of the plant, including wagons and horses—more than one hundred valuable horses having been destroyed by this excessive and fast time. And also including losses to the contractor, growing out of suits for injuries inflicted on persons in the performance of such new schedules for such new service; for which, in some instances, large damages have been recovered, growing out of and caused by said fast driving necessary to the performance of such schedules. And that losses have been incurred in addition to the contractor by fines inflicted by the Department for the nonperformance, as claimed in some instances, of the work to be done as required by said fast schedules, which were impossible of performance in some instances.

VII.

Claimant further represents to the court that it protested against the said demand of the Postmaster-General that said additional service should be performed for the compensation named in said contract, and under said protest, and to avoid the possibility of being in default in respect of said contract and the performance thereof, performed said additional service from the time the same was ordered to be performed up to the sixth (6th) day of February, 1895, for which no additional compensation has ever been received by claimant; that, by the terms of the said contract, as will more fully appear by reference to said Exhibit C hereto, claimant was to be paid quarterly for the service performed pursuant thereto, and that, from time to time, as payments were made, claimant continued to protest against the action aforesaid of the Postmaster-General in this behalf, one of which protests (although by mistake understating the true amount of service so required) is hereto attached, made a part hereof, and marked "Exhibit D;" and claimant further represents that the additional service, performed as aforesaid, extending from the 5th day of October, 1893, was of the reasonable value of $160,647.60, no part of which has been paid to claimant as aforesaid.

VIII.

Claimant further represents and shows to the court, that, in and by the advertisement, Exhibit A, hereinbefore referred to, there was embraced in the service for which proposals were invited, the transportation of the mails to elevated railroad stations in said city of New York, to wit, the stations of the Manhattan Elevated Railroad Company, at

Park Place, Franklin Square, 53d street, 84th street, 125th street, 81st street, 28th street, 53d street, Branch J, and 125th street, Branch L; that no information was furnished by or given in the said advertisement as to whether it was the purpose of the Post-Office Department to require the contractor to carry the mails up the stairways of these elevated railway stations from the place of delivery to the cars, and that in and by said advertisement no requirement of what is commonly known as "foot service" was made, nor had it theretofore been the practice of the said Department to require this foot service, except in a very limited amount and by special arrangement in that behalf with the contractor, but claimant avers that the said Postmaster-General, acting on behalf of the United
6 States as aforesaid, demanded of claimant the performance of said foot service, which was so performed by claimant, not, however, conceding that claimant was under any obligation to perform the same, but protesting that it was not, from the commencement of said contract to the 6th of February, 1895; and claimant avers that the performance of said foot service, claimant was subject to the expense incident to the employment of a large number of extra men, which additional service is reasonably worth the sum of $59,210, no part of which has ever been paid to or received by claimant.

IX.

Claimant further represents that, at the time of the publication of the advertisement aforesaid, the service necessary to be performed in carrying the mails from 8th and 28th streets to 55th street and from thence to the Industrial Building was not in existence nor within the contemplation of claimant in making said bid; that it was not embraced in said advertisement, but that the said Postmaster-General demanded that claimant should perform the same, and that claimant did perform the same, although not embraced in or covered by said advertisement, as aforesaid, and although not embraced in the said contract so entered into by the claimant with the United States; that for this additional service the claimant has never been paid any sum whatsoever, and that said service between the points last above named is reasonably worth the sum of $7,122.10, which, however, is included in the sum of $160,647.60 named in paragraph 7 hereof.

X.

Claimant further avers that it is justly entitled, as herein shown and set forth, to the moneys herein claimed to be due and owing to it from the United States, after allowing all just credits and set-offs; that no assignment or transfer of the claims above set forth, or any part thereof or interest therein except collateral security to sureties on contract, has been made to anyone whomsoever by the claimant or by anyone in its behalf.

7 Wherefore, the premises considered, the claimant demands judgment against the United States for the sum of $219,857.60.

F. C. MATHER, *Presdt.*,
Chicago, Ills.

SHELLABARGER & WILSON,
Kellogg Bldg., Washington, D. C., Attys. for Claimant.

STATE OF ILLINOIS,
County of Cook, ss:

Before me, the undersigned, a notary public, in and for the county and State aforesaid, personally appeared F. C. Mather, president, for the claimant in the foregoing petition named, The Utah, Nevada and California Stage Company, who, being duly sworn, says that he has read the foregoing petition by him subscribed, and is acquainted with the contents thereof; that the matters and things therein stated are true, as he verily believes; that the claimant is justly entitled, as shown in said petition, to the moneys therein claimed to be due and owing to it from the United States, after allowing all just credits and set-offs, and that no assignment or transfer of the claims therein set forth, or any part thereof, or interest therein, has been made by the claimant to any one whomsoever, or by any one in its behalf, except as above stated.

THE UTAH, NEVADA AND CALIFORNIA STAGE CO.,
By F. C. MATHER, *President.*

Subscribed and sworn to before me this 19th day of December, A. D. 1895.

[SEAL.] G. S. HULL, *Notary Public.*

EXHIBIT "A."

Proposals for covered regulation wagon mail messenger, transfer, and mail station service.

POST-OFFICE DEPARTMENT,
Washington, D. C., September 15, 1892.

Proposals will be received at the contract office of this Department until 4 p. m., of December 1, 1892, for carrying the mails of the United States in the covered regulation wagons prescribed by the Department, on the routes herein specified, being covered regulation wagon mail messenger, transfer, and mail station service in the cities hereinafter named, between the post-offices and railroad stations, between the post-offices and steamboat landings, between the post-offices and mail sta-
8 tions, and between the several railroad stations, steamboat landings, and mail stations, as prescribed herein, for the term from July 1, 1893, to June 30, 1897, viz: Boston, Mass., Providence, R. I., Brooklyn, N. Y., Buffalo, N. Y., New York, N. Y., Jersey City, N. J., Philadelphia, Pa., Pittsburgh, Pa., Baltimore, Md., Washington, D. C., Richmond, Va.

Decisions announced on or before December 21, 1892.

Contracts to be returned to the Department, duly executed, within thirty days from date of acceptance of proposals.

EXHIBIT "B."

Route No. 207003—Mail station service.

Probable additional service.

From—	By—	To—	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Total number of trips a week.	Running time allowed from July 1, 1893.
			Miles.				Min.
Branch O		Manhattan Elevated Railroad, Fourteenth street station.	0.17	31	5	191	15
Manhattan Elevated Railroad, Fourteenth street station.		Branch O	0.17	31	3	189	15
Branch E		Manhattan Elevated Railroad, Twenty-eighth street station.	0.17	31	5	191	15
Manhattan Elevated Railroad, Twenty-eighth street station.		Branch E	6.17	31	3	189	15

NOTE.—The postmaster estimates that there will be a material increase in the number of trips required in the mail station service.

9 Service to and from Jersey City, Hoboken, Weehawken, and Long Island City is deemed service in the city of New York within the true intent and meaning of this advertisement.

An extra wagon, with driver, ready for immediate use, must be kept at the post-office between the hours of 5 a. m., and 8 p. m., and at such other hours as the postmaster may direct, and like wagons at Courtland street ferry, at the Pennsylvania Railroad station, Jersey City, at the Grand Central depot, and at such other points, either for mail messenger, transfer, or mail station service, as the exigencies of the services may require.

Bond required with bid, $300,000.

EXHIBIT "C."

United States of America, Chicago, Cook Co., Ill.

Covered regulation wagon mail messenger, transfer, and mail station service in the city of New York, N. Y.

No. 207003. $192,000 per annum.

This article of contract, made the 21st day of December, eighteen hundred and ninety-two, between the United States of America (acting

in this behalf by the Postmaster-General) and the Utah, Nev. and Cal. Stage Co., by E. J. Travis, President, Contractor, and Ezra J. Travis, of Chicago, Ill., and George F. Harding, of Chicago, Ill., as his sureties:

Witnesseth, that whereas the Utah, Nev. and Cal. Stage Co., by E. J. Travis, Pres't, has been accepted as contractor for transporting the mails on route No. 207003, being the covered regulation wagon mail messenger, transfer, and mail station service at the city of New York, N. Y., under an advertisement issued by the Postmaster-General on the 15th day of September, 1892, for such service, and which advertisement is herewith referred to and made by such reference a part of this contract, and all new or additional service of said kinds which may at any time during the term of this contract be required in said city, at one hundred and ninety-two thousand dollars per year, for and during the term beginning the first day of July, 1893, and ending June 30, 1897:

Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United of States of America, and do bind themselves—

First. To carry said mail, using therefor wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract, and within the time fixed in the pamphlet advertisement of the Postmaster-General dated September 15, 1892; and so to carry until said schedule is altered by the authority of the Postmaster-General, as herein provided, and then to carry according to such altered schedule; to carry said mails in a safe and secure manner, free from wet and other injury, in substantial one or two horse wagons of sufficient capacity for the entire mail; the wagons to be employed in the performance of the service to be built with closed bodies, paneled from bed or sill to the height of an ordinary wagon body; above to be built of plain wood, panel set off with moulding, lined with canvas, with curved roof; the rear shall open below by gate, to drop to a level with the floor of the wagon, to fasten by means of a catch when shut; above by door hinges or spring hinges, so arranged that it shall shut tight against the gate and lock. The double wagons in all cases, and the single wagons whenever the proper performance of the service requires it, shall have double doors in the side, extending from the paneled frame of the body to the drip of the roof; these doors shall be hung on spring hinges; the locks and hinges to be used on the doors of all wagons shall be of the same make and pattern as is on exhibition on the sample door in the office of the Second Assistant Postmaster-General, at Washington, D. C. On the front shall be a seat for the driver, with footboard, trimmed and finished in leather. The wagons shall be kept painted and varnished in a thorough manner, and ornamented according to specifications, and shall be frequently washed and kept clean, and at all times be kept in good order and appearance. The painting, as to colors, ornaments, and design, both on running-gear and body, shall conform to the painting and ornamenting shown in the colored drawing on exhibition at the office of the Second Assistant Postmaster-General, at Washington, D. C. The bodies of such wagons shall be made to conform to the lithographic drawings of the side and rear elevations of both single and double wagons hereto appended and made part of this contract, giving scale of dimensions. In case it is

desired to increase or decrease the size of said wagons, such increase or decrease shall be made in exact proportion as to height and length,
11 the Postmaster-General reserving the right to vary at any time, when in his judgment the service may require it, the plan or form of wagons to be used in the service.

Second. To take the mail from and deliver it into the post-offices, mail stations, and cars at such points and at such hours under the directions of the postmaster at New York, N. Y., approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

Third. To furnish the number of regulation wagons that, in the opinion of the postmaster at New York, N. Y., will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.

Fourth. To be accountable and answerable in damages to the United States or any person aggrieved for the faithful performance by the said contract or of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this behalf; and further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor and to whom the said contractor shall commit the care and transportation of the mails, and for the faithful performance of the duties which are or may be by law imposed upon such person or persons in the care and transportation of said mails; and further, that said contractor shall not commit the care and transportation of the mail to any person under sixteen years of age, nor to any person not of good moral character, or who has not taken the oath prescribed by law, or who can not read and write the English language. Each driver shall wear when on duty the prescribed cap or hat described in the pamphlet advertisement of September 15, 1892.

Fifth. To discharge any driver or other person employed in performing mail service whenever required by the Postmaster-General so to do; not to transmit by themselves or any of them or any of their agents or be concerned in transmitting commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

Sixth. To account for and pay over any money belonging to the United States which may come into the possession of the contractor, his sureties, or employes.

Seventh. That foreign mails in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

12 Eighth. To carry post-office blanks, mail locks and mail bags, and all other postal supplies.

Ninth. To convey, whenever requested so to do, one railway post-office clerk, a substitute, or a messenger on the driver's seat of each wagon.

Tenth. To perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster-General may order at the city of New York, N. Y., during the contract term, without additional compensation, whether caused by change

of location of post-office, stations, landing, or the establishment of others than those existing at the date hereof or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General may require, as a part of such new or additional service.

For which service, when properly performed and the evidence thereof shall have been filed in the office of the Second Assistant Postmaster-General, the said Utah, Nev. and Cal. Stage Co., by E. J. Travis, pres't, contractor, is to be paid by the United States the sum of one hundred and ninety-two thousand dollars a year, to wit: Quarterly, in the months of November, February, May, and August, through the postmaster at the city of New York, N. Y., or otherwise, at the option of the Postmaster-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon without change of pay, and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

And it is further stipulated and agreed that for a failure to deliver not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail at the post-office, mail stations, depots, and landings, or for carrying the mail in a manner different or inferior to that hereinbefore specified; for suffering the mail to be wet, injured, lost, or destroyed, or for any other delinquency or omission of duty
13 under this contract; for all or any of which the contractor shall forfeit, and there may be withheld from his pay, such sums as the Postmaster-General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency.

And it is further stipulated and agreed that the Postmaster-General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier or any other person employed in the performance of service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service can not be safely performed, the revenues collected, or the laws maintained.

And it is further stipulated and agreed that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.

And it is hereby further stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster-General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or another contractor shall be made by the Postmaster-General.

And it is further stipulated that no member of, or delegate to, Congress shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

And this contract is further to be subject to all the conditions imposed by law, and the several acts of Congress relating to post-offices and post-roads.

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster-General, in accordance with the act of Congress approved March 3, 1877 (sec. 3, 19 Stats., p. 335), and the said contractor and his
14 sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

By order of the Postmaster-General:

G. F. STONE,
Acting Second Assistant Postmaster-General.

Signed, sealed, and delivered by the Second Assistant Postmaster-General in the presence of—

J. E. MCCABE.

Signed this 8th day of February, 1893.

And by the other parties hereto in the presence of—

G. T. VAN METER,
WESLEY E. TRAVIS,
Witnesses.

Signed this 28th day of December, 1892.

UTAH, NEV. & CAL. STAGE CO., [SEAL] *Contractor.*

Signed this 28th day of December, 1892, by

E. J. TRAVIS, *Prest.*, [SEAL] *Contractor.*

Signed this 28th day of December, 1892.

EZRA J. TRAVIS, [SEAL] *Surety.*

Signed this 28th day of December, 1892.

GEO. F. HARDING, [SEAL] *Surety.*

POST-OFFICE AT CHICAGO, *Dec. 28, 1892.*

I hereby certify that I am acquainted with Ezra J. Travis, of Chicago, Ill., and George F. Harding, of Chicago, Ill., and the condition of their property, and that, after full investigation and inquiry, I am satisfied that they are good and sufficient sureties for the amount in the foregoing contract.

JAMES A. SEXTON, *Postmaster.*

Certificate of the oath of mail contractors and carriers required by act of Congress of March 3, 1874.

☞ (Take this oath after signing the foregoing contract.)

I, E. J. Travis, pres't, being "employed in the care, custody, and conveyance of the mail" as contractor on route No. 207003, being cov-

ered regulation wagon mail messenger, transfer, and mail station service at New York, State of N. Y., do solemly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United
15 States which may come into my possession or control. And I also further swear that I will support the Constitution of the United States. So help me God.

UTAH, NEV. & CAL. STAGE CO.,
By E. J. TRAVIS, *Pres't, Contractor.*

COUNTY OF COOK,
State of Illinois, ss:

Sworn before the subscriber, a notary public for the county and State aforesaid, this 28th day of December, A. D. 1892, and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

WESLEY E. TRAVIS, [SEAL] *Notary Public.*

EXHIBIT "D."

Referring to the protest heretofore submitted, I beg leave to state the company's objections to the Department's action more fully and specifically as follows:

In response to the advertisement of September 15, 1892, inviting proposals for "Covered regulation wagon, mail messenger, transfer and mail station service" "in the city of New York," "the Utah, Nevada & California Stage Company submitted a proposal to perform the service from July 1st, 1893, to June 30, 1897, at $192,000 per annum." This bid was the lowest and the service was awarded to the company. The company executed its contract for service from July 1, 1893, to June 30, 1897.

Before making said proposal, the Utah, Nevada & California Stage Company endeavored to ascertain the amount and character of the service that would be required, making diligent inquiry of the postmaster of New York, and finding by actual inspection the number of horses, men, and wagons employed, the expense of ferriage and other expenses incident to the business.

For this purpose we sent our agents and officers to New York, selecting those most familiar with this business, making a personal investigation on the spot lasting over two weeks, and making estimates of the mileage and trips as advertised, and finally applying to the Department itself at Washington to be sure that no mistake had been made.

These examinations were made for the company by the officers named, who had thoroughly examined the situation five years ago, at the
16 time of the preceding letting, and with the result of finding estimates made at this letting in accord with former estimates.

Our investigation of the service advertised was conducted by our officers above referred to, who have had an experience of many years in this business and who endeavored to familiarize themselves with the business in New York, as shown by the advertisement; but they did not

learn of the existence of any foot messenger service which was expected of the bidders, or which was being performed by the former contractors. They found no indication of such service in the advertisement of the Department.

The clause in the advertisement that "mail shall be taken from and delivered into the cars" is the same in all advertisements, and the same as was made before elevated roads were known, and is the same in all cities where elevated roads are still unknown.

This foot service was not done by former contractors as obligatory upon them by their contracts; but so far as done at all was done under some special arrangement with the post-office, beginning when the service required was very small and in exchange for other services remitted.

Hence it is that the advertisement remains unchanged, and precisely as before any foot service was required, and the very same as made for all other cities.

If a different and additional service was meant in New York, it should have been plainly stated. As it is, it is a secret service only known to the old contractors.

In practice, delivery to a railroad is made by the driver. By the rules of the Department, the driver must not leave his wagon; and unless the mail can be thrown into the car from the wagon, it is thrown by the driver to the employees of the Railway Mail Service. Knowing this practice, the experienced contractor, in bidding on the New York service, under this stereotyped advertisement, could not expect to furnish an entirely new service of foot messengers.

As the service described throughout the advertisement is a wagon service, the statement that the mails are to be delivered to railways, some of which are described as elevated railways, would give no hint to the experienced contractor for the carriage of mails of a new and elsewhere unknown foot service; especially as some of the steam railways in New York (e. g. the Pennsylvania R. R.) are also elevated roads, and to such elevated steam roads no foot service has ever been required.

The advertisement calls for a service to the elevated roads of about thirty-three trips to and a like number from the railroads. The
17 orders of the Department require the contractor to perform twice this service as advertised, to wit, sixty-six trips to and sixty-six trips from the roads.

The cost of this foot service is about the sum of $28,000, while the cost of hauling the same mails the same distance by wagon at pro rata per mile of the cost of the New York service is less than $3,000.

Hence, to exact from the contractor this foot service is to inflict upon him a loss of more than $25,000 a year.

A requirement so new and unusual and of such magnitude ought not to have been left obscure and doubtful. Putting it under the old description of wagon service was calculated to allay the vigilance of the most cautious contractor.

Just in proportion to his experience would he be likely to be deceived as to the requirements of the new service between the wagon and the railroad which his experience would tell him had never before been required, and if needed at all would be performed by the Railway Mail Service.

For these reasons this company insist that it should not be required to perform this service.

Again, the Department has ordered that patent locks be provided for the wagons different from the sample used by the Department for the information of bidders, and very much more expensive than the sample lock. This company insists that it can not rightly be required to furnish a more expensive lock than the Department's sample, and claim is hereby made for the difference between the cost of the sample lock and the lock required by the Department.

The covered-wagon service has been in operation in New York City for many years, and there has been a large increase in the weight of mails conveyed and the number of trips required. It is understood that the rate of increase varies in keeping with the growth of the postal service, and the amount of service to be performed in any contract term is not specifically set forth or limited. Notwithstanding, demands for additional service under the contract entered into for performance under such general conditions should be restricted to what is just and reasonable—to what was in the minds of the contracting parties at the time the contract was made.

In the advertisement of September 15, 1892, it is stated: "The statements of probable additional service that may be necessary on the routes under this advertisement are given so that bidders may be as fully advised as possible of the amount of service likely to be required. It will not, however, limit the liability of the contractors to perform all service that may become necessary without additional pay." And on page 20 is given the "Probable additional service in New York
18 City" mail-station service, amounting to about 555 miles per annum additional travel. This company commenced the service in New York City July 1, 1893, with a new equipment of wagons and harness, and fine horses, and every appointment complete for carrying out the contract in the most efficient manner.

On August 25, 1893, fifty-five days after the commencement of the service, the Department ordered the company to supply, without additional pay, the "Distribution Station, 44th street and Lexington avenue," from September 1, 1893. This order increased the travel in covered wagons 196,581 miles per annum, on October 24, to supply Industrial Building, increasing travel 9,921 miles per annum. Thus within one hundred and twenty days from the date of the commencement of the service the Department demanded that the contractor perform 206,502 miles additional service per annum without any compensation whatever. The magnitude of these demands will appear when it is called to mind that these two orders require a yearly mileage of wagon service equal to more than eight times the distance around the world; and the disastrous consequences to the contractor will be appreciated by noting the fact that the expense of tolls alone on this additional service is $8,500 per annum.

The Postmaster-General doubtless had no thought of throwing this 44th street and Lexington avenue work upon the unfortunate bidder for the New York City M. M. service when the advertisement was issued and the bids were received. It is certain bidders could neither have had knowledge of it nor by any possibility have anticipated and estimated to cover the cost involved in such demand. Therefore, this demand upon the contractor to perform it is unjustiable, because:

1st. It is unlike any service hitherto required. It is not the growth

of the service. It is not station service. It is the duplication of the New York City post-office.

2d. Because neither party had this extraordinary service or reasonable anticipation of it in mind when the company submitted its proposal in response to the advertisement of September 15, 1892.

3d. Because it is construing a contract made in general terms, so as to exact unconscionable conditions, without precedent in the postal service.

In support of the contention that this 44th street and Lexington avenue work is not service contemplated by the advertisement of September 15, 1892, I cite the report of the Committee on Post-Offices and
19 Post-Roads, dated January 17, 1893, entitled "Additional room for New York post-office."

"The Postmaster-General, the postmaster at New York City, and the commissioners of inquiry appointed by the Postmaster-General to investigate postal matter at New York City, all admit that the mails are not delivered at that city with adequate dispatch. They agree that the trouble arises out of the insufficiency of the room in the New York City post-office.

"The Postmaster-General has no authority under existing statutes to obtain additional premises. He states that it is of very great importance to the whole postal system to have these delays at New York City prevented, and he urges immediate action on the accompanying resolution. This resolution will give the Postmaster-General authority to hire such premises in New York City as he approves, and to prepare and furnish these premises for postal business."

If the Department insist upon its demand that the company shall perform this 206,502 miles per annum of additional service without compensation it will force upon the contractor an enormous burden, and one which will seriously hinder and embarrass the company in the performance of the service undertaken in good faith and at great expense, under the advertisement of the Department and the proposal of the company.

In the annual report of the Post-Office Department for 1893, will be found this statement of the views of the Department: "It is the Department's duty to make its advertisements very full; and it is expected that bidders will investigate the past development and provide for the assured growth during the contract period."

This is a fair statement and correctly represents the principles observed by bidders in making proposals, but while the Department announces the correct principle upon which estimates, in bidding for covered regulation wagon service should be made, it fails to observe in this 44th street service and the elevated station service the elements of equity and justice in its demands after the contract is made that should mark its treatment of a service undertaken under a proposal made upon what the Department suggests as the true basis.

If, however, it be established, as is sought to be done by the Department in this case, that radical changes in the postal system of great cities, involving enormous increase of service, are to be made without compensation, the very principle suggested by the Department as the
20 proper one upon which to base proposals will be destroyed and every bidder threatened with ruin.

If the report of the committee of Congress be accepted the Post-Office Department was aware of the necessity of some measure of relief for the

New York post-office long before the issuance of the advertisement of September 15, 1892, but there was not the slightest intimation in the advertisement that the bidder for covered-wagon service would be required to provide the relief at his own cost and damage.

This company, believing that the demands of the Department are unjust and improper, respectfully protest against the performance of these services without just and reasonable compensation.

THE UTAH, NEVADA AND CALIFORNIA STAGE CO.,
By E. J. TRAVIS, *Prest.*

21 II.—*General traverse—Filed April 6, 1904.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

22

23 III.—*Amended petition—Filed January 8, 1903.*

Comes now the claimat, The Utah, Nevada and California Stage Company, by its attorney, and with leave of the court in that behalf first had and obtained, amends the petition by it heretofore filed herein as follows, to wit:

Amend the second paragraph of the sixth subdivision of said petition, so as to make it read as follows:

"That on the 24th day of October, 1893, the said Postmaster-General, so acting on behalf of the United States as aforesaid, further increased the services aforesaid, to the extent of 9,921 miles, by the establishment of an additional station at the Industrial building, in said city, and demanded that claimant perform said additional service; that the aggregate of the increse of the service aforesaid, within 120 days from the date of the commencement thereof under said contract, was

24 413,604 miles per annum; that this increase of service occasioned an enormous additional expense to claimant—in the mere matter of ferry tolls alone involving an expense of more than $9,950.22 per annum; that this is an increase of service that is entirely out of proportion to anything contemplated at the time of entering into said contract, and of which claimant had no previous knowledge or information other than that furnished by said estimated probable increase of service hereinbefore set forth, and hereto attached as Exhibit B."

Amend the seventh subdivision so as to read as follows:

"VII.

"Claimant further represents to the court that it protested against the said demand of the Postmaster-General that said additional service should be performed for the compensation named in said contract, and under said protest, and to avoid the possibility of being in default in respect of

said contract and the performance thereof, performed said additional service from the time the same was ordered to be performed up to the sixth (6th) day of February, 1895, for which no additional compensation has ever been received by claimant; that, by the terms of said contract, as will more fully appear by reference to said Exhibit C hereto, claimant was to be paid quarterly for the service performed pursuant thereto, and that, from time to time, as payments were made, claimant continued to protest against the action aforesaid of the Postmaster-General in this behalf, one of which protests (although by mistake understating the true amount of the service so required) is hereto attached, made a part hereof, and marked Exhibit D; and claimant further represents that the additional service, performed as aforesaid, extending from the 5th day of October, 1893, was of the reasonable value of $189,875, no part of which has been paid to claimant, as aforesaid."

25 Amend the eighth subdivision to read as follows:

"VIII.

"Claimant further represents and shows to the court that in and by the advertisement issued by the defendant, and hereinbefore mentioned, there was embraced in the service for which proposals were invited the transportation of the mails from various branch post-offices to various stations on the Manhattan elevated railroad, and from said last-named stations to said various branch post-offices, the number of daily trips being given in said advertisement; but claimant alleges and shows to the court that said advertisement only disclosed one-half the number of trips which were necessary in order to so transport the said mails between said branch post-offices and said elevated railroad stations; and that by reason of said fact, as last stated, the claimant, as to said branch post-offices and elevated railroad stations, was compl'led to do and perform just double the amount of service indicated by said advertisement upon which claimant based its proposal and was awarded the contract as heretofore set forth in this petition; and that this additional service it did under protest.

"And claimant further represents that no information was furnished by or given in the said advertisement as to whether it was the purpose of the Post-Office Department to require the contractor to carry the mails up the stairways of the elevated railroad stations from the place of delivery to the cars, and that in and by said advertisement no requirement of what is commonly known as 'foot service' was made, nor had it theretofore been the practice of the said Department to require this foot service, except in a very limited amount and by special arrangement in that behalf with the contractor; but claimant avers that the Postmaster-General, acting on behalf of the United States as aforesaid, demanded of claimant the performance of said foot service, which was so performed by claimant, not, however, conceding that the claimant was under any obligation to perform the same, but protesting that
26 it was not from the commencement of said contract to the 6th of February, 1895. And claimant now avers that the extra and additional service it was compelled to perform by reason of the fact that said advertisement disclosed only one-half of the daily trips necessary

as above set forth, and the said foot service in carrying the mails up the said stairways is reasonably worth the sum of $62,525.75, no part of which has ever been paid to or received by claimant."

Amend the last paragraph of the tenth subdivision to read as follows:

"Wherefore, the premises considered, the claimant demands judgment against the United States for the sum of $262,350.97."

THE UTAH, NEVADA AND CALIFORNIA STAGE COMPANY,
Claimant.
By A. A. HOEHLING, Jr.,
Attorney for Claimant.
J. H. MCGOWAN,
Of Counsel.

27 IV.—*Findings of fact and conclusion of law.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant is a corporation, duly created, organized, and existing under the laws of the State of Utah, having its principal office in the city of Chicago, State of Illinois.

II.

On September 15, 1892, the Postmaster-General caused to be published an advertisement inviting proposals for the performance of "covered regulation wagon mail messenger, transfer, and mail station service" in the city of New York, State of New York, on mail route No. 207003, for the term from July 1, 1893, to June 30, 1897.

III.

The "Instructions to bidders," contained as a part of said advertisement, were as follows:

1. The foregoing schedule shows the service required August 15, 1892, as near as can be stated. Bidders must inform themselves of the amount and character of the service that will be required during the next contract term.

The statements of probable additional service that may be necessary on the routes under this advertisement are given so that bidders may be as fully advised as possible of the amount of service likely to be required. It will not, however, limit the liability of the contractors to perform all service that may become necessary without additional pay.

2. The contractors under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1893, or at any time
28 thereafter during the contract term, whether between post-offices and railroad stations, between post-offices and steamboat landings,

between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations now established or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post-offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary by any other reason. Bids must be made with this distinct understanding, and must name the amount per annum for the whole service and not by the trip.

3. There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay.

4. The Postmaster-General may annul a contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a driver or any person having charge of the mail when required by the Department; for transmitting commercial intelligence or matters which should go by mail contrary to the stipulations herein, or for transporting persons so engaged; whenever the contractor shall become a postmaster, assistant postmaster, clerk in a post-office, or member of Congress, and whenever, in the opinion of the Postmaster-General, the service can not be safely continued or the laws maintained on the route.

Fines will be imposed for neglect of duty.

5. The Postmaster-General may, in his discretion, continue in force, beyond its express terms for a period not exceeding six months, any contract made under this advertisement until a new contract with the same or other contractors shall be made.

6. The distances given are believed to be substantially correct, but no additional pay will be allowed should they be greater than herein stated.

Bidders must inform themselves as to the distances, the running time, the weight of the mails, the condition of hills, streets, toll bridges, ferries, and obstructions of all kinds whereby expense may be incurred, and as to the probable increase, additional service, or changes likely to be rendered necessary. Claims for additional pay based on such grounds, or for alleged mistakes or misapprehensions as to the service required, or for bridges destroyed or ferries discontinued, can not be considered.

7. Foreign mails in transit across the territory of the United States shall, within the meaning of this advertisement, be deemed and taken to be mails of the United States.

8. The transfer service shall include the conveyance of all post-office supplies arriving for the city post-office or for transit through the city.

9. Contractors will be required to convey on the driver's seat of each wagon, whenever necessary, one railway post-office clerk, a substitute, or a messenger.

10. Drivers must be over sixteen years of age, of good moral character, and able to read and write the English language. They must take the oath required by law, and must wear the prescribed cap or hat.

29 11. All service shall be performed in regulation wagons, unless otherwise mentioned in statement of route. Full particulars as to style and construction of wagons required may be obtained on application to the Second Assistant Postmaster-General, Washington, D. C. Wagons constructed according to the style adopted by the Post-Office Department, of a size about midway between the large two-horse and *and* the large one-horse wagon, preserving the plan of the former, will be permitted, but for these at least two horses shall be used. The wagons shall be kept painted and varnished in a thorough manner, and ornamented according to specifications. They must also be frequently washed and kept clean and in good condition. New wagons are not required by the specifications, but only wagons of the prescribed pattern, in first-class condition, and to be as substantially constructed as new wagons. First-class horses shall be used. The wagons, besides being constructed in accordance with the plans and specifications must be provided with an additional device in the nature of an iron rod connecting the doors with the driver's seat, so that the doors can not be opened without the knowledge of the driver. A similar device is now in use on the wagons at New York, N. Y.

12. When mails are delayed in arrival, wagons must be kept at the depots or landings until the arrival of such mails, and the same be conveyed to the post-office without detention. Except in cases of accident, wagons containing mail must not be opened, or the mails therein contained changed while in transit. The mails must be carried inside of the wagons, and not on the outside or on the seat with the driver, and in no case shall any person be allowed to ride inside of the wagon containing mail.

13. The equipment of the contractor shall be subject to monthly inspections, and the refusal or failure of any contractor to keep his wagons, horses, and harness in good order and appearance, or to furnish proper drivers, so as to perform the service in a style creditable to the Department, shall be sufficient cause for the annulment of his contract and the reletting of the service at his expense.

14. Specifications for cap and hat: Cap—To be of all wool blue flannel of good quality, three and one-fourth (3¼) inches high, solid leather fronts one and three-fourths (1¾) inches deep, with one (1) small regulation P. O. D. button on each side, a silver wreath in front inclosing the words "U. S. Mail," and to have one oil linen cover. Hat—From June 16 to September 15 of each year, in lieu of the cap, a straw hat with rim not to exceed three and one-half (3½) inches in width and a crown not to exceed four (4) inches in height may be worn. A silver wreath inclosing the words "U. S. Mail" shall be placed on the front of the hat.

15. The wagons, horses, harness, and drivers are to be at all times subject to the approval and control of the postmaster; and the mails are to be taken from and delivered into the post-offices, mail stations, steamboats, and cars at such points and at such hours, under his direction, approved by the Postmaster-General, as will secure proper dispatches and connections, and at the contractor's expense for tolls and ferriage.

16. The number of wagons required must be sufficient, in the opinion of the postmaster, for the prompt and proper performance of the service.

17. The contractor will be required to provide and keep on hand a sufficient number of extra wagons to take the place of those which may be temporarily disabled, delayed, waiting for trains, or withdrawn from service for repairs, or required by the increase of service, so that the service shall always be promptly performed in regulation wagons.

18. Every proposal must be accompanied by a bond with two or more sureties approved by a postmaster, and in cases where the amount of the bond exceeds five thousand dollars ($5,000) the approval must be by a postmaster of the first, second, or third class.

19. Sureties on the bond of a bidder must take an oath before an officer qualified to administer oaths that they are the owners of real estate worth, in the aggregate, a sum double the amount of said bond, over and above all debts due and owing by them, and all judgments, mortgages, and executions against them, after allowing all exemptions of every character whatever. A married woman will not be accepted as a surety either on the bond of a bidder or upon a contract. Accompanying the bond of a bidder, and as a part thereof, shall be a statement of the sureties, under oath, showing the amount of real estate owned by them, brief descriptions thereof, and its probable value, where it is situated, and in what county and State the record evidence of their titles exists. Any surety who swears falsely to this statement is deemed by the law guilty of perjury, and is punishable as is prescribed by law for that crime.

20. There should be but one route bid for in a proposal. Consolidated or combination bids ("proposing one sum for two or more routes") can not be considered.

21. Bidders are cautioned to forward their proposals in time to reach the Department, or to file them by the day and hour named in this advertisement, as bids received after that time will not be considered. If sent by mail or express, ample time should be allowed for their transit, as they can not be deemed to be received at the Department until actually delivered at the contract office; neither can bids be considered which are without the bond, oath, or certificate required by section 245, act of June 23, 1874, and section 246, act of August 11, 1876. No withdrawal of a bid will be allowed unless the withdrawal is received twenty-four hours previous to 4 p. m. December 1, 1892.

22. No contract for carrying the mail shall be made with any person who has entered or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promise to give or perform, any consideration whatever to induce any other person not to bid for any such contract.

23. In case of failure of the accepted bidder to execute a contract within the prescribed time, or of the abandonment of service during the contract term, the service will be relet at the expense of the failing bidder or contractor, and any accepted bidder who shall wrongfully refuse or fail to enter into contract in due form and to perform the service described in his proposal, may be deemed guilty of a misdemeanor, and on conviction thereof be fined and imprisoned therefor.

24. The Postmaster-General reserves the right to suspend the award of contract on any route for a period not exceeding thirty days after the

date fixed in this advertisement, with a corresponding allowance of
31 time for the execution of contract, and to reject all bids on any route whenever, in his judgment, the interests of the service require it; and also to disregard the bids of failing contractors and bidders, and also to disregard bids accompanied by bonds on which there appears as surety the name of a person who has been declared a failing contractor or bidder, or been barred from bidding for any reason whatever.

25. Postmasters are cautioned, under penalty of removal, not to approve the bond of any bidder before the proposal is completed and the bond is signed by the bidder and his sureties, and not until entirely satisfied of the sufficiency of the sureties. They are also cautioned not to divulge to anyone the amount of any proposal certified by them. Doing so will be sufficient cause for their removal.

26. No postmaster, assistant postmaster, or clerk employed in any post-office shall be a contractor, or concerned in a contract for carrying the mail.

27. Bidders are requested to use the blanks for proposals furnished by the Department, which may be obtained at the post-office on each route herein advertised. For information relative to the service and its requirements bidders are requested to apply to the postmaster at the city where the service is to be performed.

28. Proposals should be inclosed in envelopes, sealed, and superscribed "Proposals for covered regulation wagon mail messenger, transfer, and mail station service, city of ———," and addressed to the Second Assistant Postmaster-General, Post-Office Department, Washington, D. C.

JOHN WANAMAKER,
Postmaster-General.

IV.

Pursuant to said advertisement the claimant submitted a proposal for the performance of the service therein described for the city of New York, which was accepted by the defendants, and a contract was entered into, being Exhibit C annexed to the petition.

V.

During the period for which suit is brought, the claimant performed the service specifically described in the schedule of the advertisement, claiming that, in addition thereto, it performed, as required by the defendants, and under protest, other service hereinafter set forth, not required by the terms of the contract.

VI.

At the time of the advertisement for proposals aforesaid, September 15, 1892, the service therein referred to and hereinafter particularly described, involved a transportation of the mails of, approximately, 973,674.22 miles per annum, and in said advertisement bidders were notified that the probable annual increase in said service would amount to 6,718.40 miles per annum, as shown by Exhibit B, attached to said petition.

32

VII.

Between the date of said advertisement for proposals (September 15, 1892) and the time when the claimant under his said contract was to commence the performance thereof (namely, July 1, 1893), additional service was required which increased the amount of annual mileage on said last-named date to 1,012,604.54 miles.

VIII.

On August 22, 1893 (something less than two months after chaimant entered upon the service of transporting the mails under said contract), the Second Assistant Postmaster-General, on behalf of defendants, made the following order:

POST-OFFICE DEPARTMENT,
OFFICE OF SECOND ASSISTANT POSTMASTER-GENERAL,
RAILWAY ADJUSTMENT DIVISION,
Washington, D. C., August 22, 1893.

SIR: You are informed that the following order has this day been made on route No. 207003, covered regulation-wagon service, at New York, N. Y.:

"From September 1, 1893, require contractor to perform additional mail-messenger service for the supply of distribution station, Forty-fourth street and Lexington avenue, as per following statement, or more frequently if necessary, without additional pay, in accordance with the terms of his contract."

The statement referred to in the above order is inclosed herewith.

Very respectfully,

J. LOWRIE BELL,
Second Assistant Postmaster-General.

UTAH, NEVADA, AND CALIFORNIA STAGE CO.,
E. J. TRAVIS, *President*,
No. 525 E. 15th street, New York, N. Y.

Additional mail-messenger service.

To the distribution station, 44th st. and Lexington ave., from the following-named railroad stations.	Distance.	Number of trips daily except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of trips a week.	Running time allowed.
Grand Central R. R. station, New York:	*Miles.*					*Min.*
New York Central and Hudson River R. R. (Hudson Riv. div.)	0.41	23	12	.....	150	10
New York Central and Hudson River R. R. (Harlem div.)	0.41	5	.....	.....	30	10
New York, New Haven and Hartford R. R.	0.41	28	9	5	182	10
Long Island R. R. station, Long Island City:						
Long Island R. R. via 34th st. ferry	1.50	20	1	.....	121	30
West Shore R. R. station, Weehawken, N. J.:						
West Shore R. R. via 42d st. ferry	2.49	10	1	.....	61	30
Manhattan Elevated R. R., 42d st. station:						
New York and Northern R. R	0.55	2	.....	.....	12	10

33 *Additional mail-messenger service*—Continued.

From distribution station, 44th st. and Lexington ave., to the following-named railroad stations.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of trips a week.	Running time allowed.
Grand Central R. R. station, New York:						
New York Central and Hudson River R. R. (Hud. Riv. div.)	*Miles.* 0.41	20	10	.....	130	*Min.* 10
New York Central and Hudson River R. R. (Harlem div.)	0.41	6	1	.....	37	10
New York, New Haven and Hartford R. R.	0.41	26	6	.....	162	10
Pennsylvania R. R. station, Jersey City:						
Pennsylvania R. R. via Desbrosses st. ferry	4.00	28	15	.....	183	40
New York, Susquehanna and Western R. R. via Desbrosses st. ferry	4.00	6	.....	.....	36	40
New York and Long Branch R. R. via Desbrosses st. ferry	4.00	2	.....	.....	12	40
New York, Lake Erie and Western R. R. station, Jersey City:						
New York, Lake Erie and Western R. R. via 23d st. ferry	4.20	13	3	5	86	40
New York and Greenwood Lake R. R. via 23d st. ferry	4.20	6	.....	.....	36	40
Northern R. R. of New Jersey via 23d st. ferry	4.20	5	1	5	36	40
New Jersey and New York R. R. via 23d st. ferry	4.20	3	.....	.....	18	40
Long Island R. R. station, Long Island City:						
Long Island R. R. via 34th st. ferry	1.50	20	2	.....	122	20
Del., Lack. and Western R. R. station, Hoboken, N. J.:						
Del., Lack. and West. R. R. (main line) via Christopher st. ferry	3.60	8	2	5	55	35
Del., Lack. and West. R. R. (Morris and Essex div.) via Christopher st. ferry	3.60	13	.....	.....	78	35
Reading R. R. System station, Jersey City:						
Central R. R. of N. J.	4.60	7	1	.....	43	50
Balto. and Ohio R. R.	4.60	4	2	.....	30	50
New York and Long Branch R. R.	4.60	4	1	.....	25	50
Lehigh Valley R. R.	4.60	5	2	.....	32	50
Staten Island Rapid Transit R. R. ferry, foot of Whitehall st., New York:						
Staten Island Rapid Transit R. R.	4.13	5	.....	.....	30	50
West Shore R. R. station, Weehawken, N. J.:						
West Shore R. R. via 42d st. ferry	2.49	4	.....	.....	24	30
New York, Ontario and Western R. R. via 42d st. ferry	2.49	4	1	.....	25	30
Manhattan Elevated R. R., 42d st. station:						
New York and Northern R. R.	0.55	2	.....	.....	12	10

Under date of October 23, 1893, Second Assistant Postmaster-General J. Lowrie Bell, on behalf of the defendant, made the following order:

POST-OFFICE DEPARTMENT,
OFFICE OF SECOND ASSISTANT POSTMASTER-GENERAL,
RAILWAY ADJUSTMENT DIVISION,
Washington, D. C., Oct. 23, 1893.

SIR: You are informed that the following order has this day been made on route No. 207003, regulation-wagon service, at New York, N. Y.: From Oct. 25, 1893, require contractor to perform service as

34 follows (or more frequently, if necessary), without additional compensation, in accordance with the terms of his contract:

Additional mail-station service.

From—	To—	Distance.	No. of trips daily, except Sunday.	No. of trips on Sunday.	Total number of trips a week.	Running time allowed.
Branch O.....	Industrial Building Branch	1.60	17	4	106	25

Very respectfully,

J. LOWRIE BELL,
Second Ass't P. M. Gen'l.

UTAH, NEV. AND CAL. STAGE CO.,
E. J. TRAVIS, *Pres't,*
525 East 15th st., New York, N. Y.

IX.

Under the preceding arrangement ordered by the Department all first-class matter (letters) previously collected in the district of Station H continued to be received and handled there; massed matter made up by States for the east, north, and west, which had previously been sent to the general post-office for distribution, was sent to the Industrial Branch to be distributed; the south and west mail was taken there during the period in suit and assorted; and all of the second-class bulky matter of publishers above Fourteenth street, which had previously been received at Station O, was received at the Industrial Building; also third and fourth class matter mailed in uptown stations, which had previously come to the general post-office, was sent to the Industrial Building, thereby relieving the general post-office from handling that matter.

X.

The orders aforesaid required the claimant to carry the mails from the new station, designated as "the distributing station, at Forty-fourth street and Lexington avenue" (known in the record as the Industrial Building Station), direct to the various railroad stations and other points to which mail was then being carried from the general post-office. The aggregate of distances from the Industrial Building to the railroad stations and other points, as given in said orders, is 27.28 miles; the aggregate of distances from the general post-office to the same railroad stations and other points is 20.85 miles.

XI.

The result of the orders aforesaid was that claimant was compelled to increase the number of wagon trips from October 25, 1893, to February 6, 1895, over and above what would have been the normal increase, and increased the distance to be traveled by the wagons, over and above the normal increase, 311,939 miles for the period from October 5, 1893, to February 6, 1895.

35

XII.

By establishing the distribution station in the Industrial Building, and issuing the orders above set forth, there was no diminution in the number and character of the runs to and from the general post-office, nor was the mileage at said general post-office thereby diminished. To perform this extra service to and from the Industrial Building the claimant was required to purchase from 80 to 100 additional horses, and from 32 to 33 additional wagons; to put on from 45 to 46 new runs, and to employ from 33 to 50 additional men—drivers, hostlers, etc. The orders resulted in such increased speed in carrying the mails from the Industrial Building to some of the railroad stations that in obeying them it was necessary to violate the city ordinances as to the rate of speed; it largely increased the wear and tear on the wagons; it injured and shortened the period of usefulness of the horses, some of them dying from overexertion in hot weather by reason of the fast driving made necessary by the short time allowed to make the various trips.

XIII.

The increase of runs to the railroad stations outside the city of New York, made necessary by the establishment of the extra service from the Industrial Building, increased the necessary expenditure by claimant, in the matter of ferry tolls, in the sum of $9,950.22.

The additional service trips, during the period aforesaid, made by the claimant, under the requirements of the orders above stated, in Finding VIII, were worth, at a fair and reasonable compensation, including therein the expense of ferry tolls, the $68,483.

XIV.

At no time prior to making said bid, or prior to entering into said contract, was any intimation or information given by the defendants' officers to claimant that they contemplated or intended the establishment of a service at the Industrial Building.

XV.

The court further finds, at the defendants' request, that in March, 1893, the defendants rented the premises in Industrial Building at Forty-fourth street and Lexington avenue, for postal purposes in order to relieve the general post-office, the available space in which had become inadequate to accommodate the increased volume of business. A postal station was established therein, and the contractor was required to transport the mails between it and the various railroad stations and some postal stations. This postal station was constituted as follows:

Station H was moved May 1, 1893, from its location at No. 156 East Fifty-fourth street into the above-named premises.

Thereafter, on September 1, 1893 (service began October 4, 1893), there was inaugurated in the same premises and in connection with Station H the distribution department, which was variously known as "Distribution station," "Industrial station," and "Station H (distribution department)," and the two together were sometimes known as "Industrial Branch station."

36 Before and after the removal of Station H, as above stated, it was in all respects a branch post-office, at which there were collections and deliveries of mail by carriers, distribution of mail matter for dispatch, registration of letters, sale of stamps, and the issuing of money orders.

Both that part of the industrial branch which had been known as Station H and that part which was referred to as "Distribution station," etc., were situated on the same floor of the Industrial Building, and were at all times connected by a passageway. The former was in charge of a superintendent of station, and the latter was, until January 5, 1895, under the direction of an assistant of the superintendent of mails of the general post-office. Station H continued the collection and delivery of mail by carriers, the sale of stamps, the registration of matter, and sale of money orders, while the distribution department had charge of the distribution of second, third, and fourth class matter. The collectors for Station H proper carried their collections of mail directly into and deposited them in the distribution department and the distribution for dispatch and the assortment for city delivery were made there.

After the equipment of Industrial Branch station, second-class mail matter mailed by publishers and originating north of Fourteenth street was mailed at that station.

This mail matter had previously been mailed at the general post-office and at Station O, at which points the distribution had theretofore been made and dispatch made to the several railroad stations, as specifically stated in the advertisement. Thereafter no further such mailing of second-class matter was made at Station O, and all dispatches of said mailed matter for the West and New England States and to and from Grand Central Station were made from the Industrial Branch station, a distance of approximately 6 blocks, instead of from the general post-office, 3½ miles distant, and from Station O, 1¾ miles distant, as theretofore.

The congested state of the general post-office on account of lack of adequate space, for the remedy of which Station O had been established some years before, was well known for some time prior to the advertisement and proposal for this service.

XVI.

The advertisement issued by the Post-Office Department, under date September 15, 1892, inviting proposals for covered regulation wagon mail messenger, transfer, and mail station service which was made a part of the contract between defendants and claimant, undertook to give a schedule of the service in said city as the same existed and was in operation on August 15, 1892, as stated in said advertisement, "so that bidders may be as fully advised as possible of the amount of service likely to be required."

The advertisement above named inadvertently stated the service in operation August 15, 1892, between the Manhattan Elevated Railroad stations and the general post-office and certain branch post-offices at but one-half the number of trips actually required. Consequently the claimant was required to and did perform the number of trips which were actually performed theretofore, but which were double the number thus specified.

37 Claimant performed said additional service, under protest made in January, 1894; and in thus carrying the mails from mail stations F, H, Y, K, W, G, E, and O to the nearest elevated-railroad stations, and from these latter stations back to the said mail stations, from July 1, 1893, to the commencement of this suit, to wit, February 6, 1895, it made 181,728 trips, for which extra service a fair and reasonable compensation, including the foot service of delivering the mails into the railroad stations, is the sum of $14,538.

XVII.

The "foot service," for which extra compensation is claimed, consisted in carrying the mails up the stairways and delivering them to the Manhattan Elevated Railroad Company, at the stations on said elevated railroad nearest to the several mail stations, namely, stations D, F, H, Y, K, L, J, W, G, E, O, and V. Claimant performed this "foot" stairway service under protest, as being service not included in its contract, and said extra service so required and performed during the term from July 1, 1893, to February 6, 1895, necessitated 479,875 trips—a trip consisting of either going up or coming down said stairways, waiting until the arrival of the train, and making delivery of the mail to the messenger on the train; said designation "trip" being irrespective of the number of bags contained in any particular mail, or the number of men required to carry it. This service required the employment by claimant of additional men at each said station.

If the claimant is entitled to recover for this service, a fair and reasonable compensation therefor will be the sum of $14,300 in addition to the amounts set forth in Findings XIII and XVI.

XVIII.

Said elevated-railroad stations were not situated on the surface of the streets, but were at the same elevations as the railroad tracks, and could only be reached by ascending the steps from the surface of the streets provided and used for that purpose. Prior to the commencement of claimant's term of service it had been customary for the contractor generally to exchange the mail with the Government's messengers on the platform of the station at the door of the car.

Upon the commencement of the claimant's term of service it did, without protest, begin the performance of the service between the general post-office and the Manhattan Elevated Railroad station at Park place, and between postal branches O, E, G, W, J, D, F, H, and K, and the Manhattan Elevated Railroad stations at indicated streets, by the continuation of the method of such performance theretofore used under permission of the preceding contractor, namely, by messengers without wagons or carts in some cases and by carts in others. Subsequently, in accordance with the manner adopted by the claimant as above stated, the Department formally authorized, by order, its performance in push carts. Thereafter, at the request of claimant, permission was given allowing performance of a portion of said service by messengers without carts or wagons.

The performance of the service thus referred to included the carriage of the mail up and down the stairways to and from the elevated
38 stations, and no protest as to any portion of it was made by the claimant until mention was made of it in its letter received at the Department January 30, 1894.

During most of and the latter part of the term of contract next preceding that of the claimant, and at the time of the issuance of the advertisement and the submission of claimant's proposal, the previous contractor had been required to and did perform this like service up and down the stairs to all elevated stations from all postal stations at which this service was then required. At certain terminal stations where the mails were heavy the postal employees, under instruction, assisted the contractor's employees in order to facilitate the dispatches, but in nowise to assume such service on the part of the Government.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover the sum of sixty-eight thousand four hundred and eighty-three dollars ($68,483) as set forth in Finding XIII, and should recover fourteen thousand five hundred and thirty-eight dollars ($14,538) as set forth in Finding XVI; but should not recover for the services set forth and described in Finding XVII.

V.

OPINION.

NOTT, Ch. J., delivered the opinion of the court:

These mail-messenger contracts, in substantially identical language, have been again and again before the court during the last eighteen years. Their provisions have been construed, and both parties, though the amounts involved were large, have remained content with the decisions of the court; that is to say, no case has been appealed. It must, therefore, be regarded as the settled rule of decision of this court that the "new or additional mail-messenger or transfer service" which is to be performed "without additional compensation" is one thing, and that service which is different in kind and character is another; and that for the former the contractor can not recover, but for the latter he may.

The present case is peculiar, and unlike those which have gone before it in this: That the services constituting the principal cause of action were in form "new or additional," but in substance a radical and extraordinary departure from the reasonable obligations of the contract. The very magnitude of the service exacted by the Post-Office Department changed the service in kind and character. In form it was "new or additional;" in substance it was rendered for a new and different system of postal administration in the city of New York of such magnitude that it could not have been anticipated or foreseen by the most prudent and experienced business man who proposed to bid for the service or enter into the contract. It was service different in kind and character, because it was incidental and consequent to the introduction of a condition into the city postal service which had never been there before—the establishment of a new post-office system.

The magnitude of the change is conclusively shown by the leading facts in this case:

In 1892 the postal business in the city of New York had so outgrown the capacity of the general post-office that it was seriously con-
39 gested, and an enlargement of that building, directly or indirectly, was imperatively and immediately required. To meet this postal exigency, Congress authorized the renting of a building "to be used for general post-office business in said city." (Act 3d March, 1893, 27 Stat. L., p. 732.) The Department thereupon rented a large building at Forty-fourth street and Lexington avenue, known as the "Industrial Building," 3½ miles distant from the general post-office. The city may then be considered as having been divided by a line running through Fourteenth street, and all of the postal business south of that line was retained in the general post-office, and nearly all of the business north of that line was transferred to the new building, popularly known as the "Industrial Building Branch," officially designated as "Station H." There was thus established, in effect, two general post-offices and two general postal systems where there had been only one before.

The duplication of systems is more clearly illustrated by the duplication of services which accompanied it.

When the claimant entered into the performance of the contract there was handed to its officers a printed book, entitled "Post-Office, New York, N. Y., Transportation Schedule." The arrivals and departures and hours and places therein set forth indicated the service to be performed. When the new general post-office was established in the Industrial Building, there was handed to the claimant another copy of the same printed book, showing the same railway stations and trips, and, with some modifications, the same hours at which trips were to be performed. On the title of this copy of the book was pasted a slip saying "Industrial Building Branch." In other words, as the requirement was duplicated, so the contractor's services were substantially doubled. Where it had been required to send out one wagon at a certain hour to make one trip from one place to a railroad depot, it was required to send out two wagons for the same train at substantially the same hour and from two places. That is to say, where one wagon load of mail matter went from the general post-office to the Pennsylvania Railroad depot in Jersey City, two wagons now had to go, the one from the general post-office and the other from the Industrial Building; and, conversely, when the mail arrived at the Pennsylvania depot, two wagons had to meet it, the one to carry half of it to the old general post-office and the other to carry the remainder of it to the new general post-office.

Again, there was a post-office station known as "Station O" (which had been a subject of litigation in this court, Woolverton's case, 34 C. Cls. R., 247), used chiefly for the bulky second-class printed matter of publishers, and such matter was received chiefly at Station O. After the establishment of the new post-office in the Industrial Building, this Station O, so far as it related to second-class matter, was abandoned, and such matter was received only at the Industrial Building. So far it would seem that here was but the substitution of one place for another—that Station O was merely moved from Thirteenth street and Fifth

avenue to Forty-fourth street and Lexington avenue. But it appears that the number of trips previously made from Station O daily was 17, and on Sunday 4, while the number of trips made from the Industrial Building was 266 daily and 70 on Sunday. That is to say, "all first-class matter (letters) previously collected in the district of Station H continued to be received and handled there; massed matter made up by States for the East, North, and West, which had previously been sent to the general post-office for distribution, was sent to the Industrial Branch to be distributed; the South and West mail was taken there during the period in suit and assorted, and all of the second-class bulky matter of publishers above Fourteenth street, which had previously been received at Station O, was received at the Industrial Building; also third and fourth-class matter mailed in uptown stations, which had previously come to the general post-office, was sent to the Industrial Building, thereby relieving the general post-office from handling that matter."

It is probable that the duplication of wagon trips did not literally double the contractor's expenses. When the mail matter was divided between the two general post-offices the quantity sent to and from the old general post-office was diminished. The wagon which was previously drawn by two horses may have been drawn by one; where three loads had come or gone at a certain hour from or to a certain place the mass of that "dispatch," as it is called, may have been reduced to two loads. But, nevertheless, it appears that the duplicate service which was exacted from the contractor instantly required more than 80 additional horses, more than 32 additional wagons, from 33 to 50 additional men, and involved an additional mileage service, estimated by the claimant's witnesses at 463,000 miles per annum, and conceded by the defendants to be at least 311,939.47. The increased cost to be borne by the contractor is also significantly shown by the fact that the increased expense for the ferriage of wagons which had to cross the North and East rivers in the delivery of mails to the railroads was $9,950.22.

The term "dispatch" is a technical one in the postal service, and means a mass of matter to be sent to a certain place at a certain time. The term "trip" is also technical, and refers to the wagon which will carry the whole or a part of the dispatch.

In previous cases relating to these mail-messenger contracts the court has always been guided by a general principle. The contract has been considered, like all contracts, as having a definite subject-matter, known to both parties, concerning which they were contracting, but subject to two future unknown fluctuations in the volume of the business and the amount of the service to be rendered. These fluctuations would be, the one always and the other frequently, adverse to the contractor. The first would be the inevitable growth of the postal business during the ensuing four-year period of the contract; the second, the increased internal machinery of the existing system, such as new stations, more frequent dispatches, etc., consequent to the increased volume of postal business, or necessary, in the judgment of the Department, to remedy defects in the existing system and make it more effective for the public convenience. Accordingly, it has also been held that the Department might multiply the number of branch post-offices and stations and

increase the wagon trips to and from the railroads and between the general post-office and the branch post-offices and stations, but could not bring into the contract a new subject-matter and compel the contractor to render without compensation a service which he had not contracted to perform.

Thus, where the contractor had agreed to carry the mails from the general post-office in New York to the railroads in Jersey City, the court held that he could not be required to carry them to the Jersey City post-office; and where he had agreed to carry them between the
41 general post-office and the branch post-offices and stations in the city, that he could not be required to carry them to numerous newly-devised substations of a different character, scattered about the city in apothecaries' and cigar shops. In a word, the subject-matter of the contract was held to be the administrative system of the postal service in the city as it existed when the contract was made, with such additions or abbreviations as might be expressly set forth in the contract.

In the present case the bricks and mortar of the changed administrative system are the same—there are the same post-office stations and railroads and steamboats—but out of identical materials an entirely new edifice has been built. In the details there has been no change, but in the aggregate of changes there has been an entire reconstruction of the system, and the new subject of contract brought thereby into the field of operation is far greater than in any case that has heretofore been brought before the court. The court is therefore of the opinion that for this service so rendered the claimant is entitled to recover what the service was reasonably worth. To hold otherwise would be to hold that this carefully prepared contract, with the elaborate specifications thereto annexed, might be reduced to three lines: The undersigned, in consideration of $, covenants and agrees that during the next four years he will do whatever the Post-Office Department bids him.

There is a second cause of action, founded upon misinformation given to the contractor when the bid was made and the contract executed.

The advertisement for proposals represented that there were two stations on an elevated street railroad in the city which were each served, going and coming, by 62 trips of daily mail-messenger service. In fact, there were just double that number of stations, and the business existing required just double the alleged number of trips. In the case of Burgwyn (34 C. Cls. R., 348), which was relied upon by the defendants, the decision rested upon the fact that the information which the contractor needed (the soundings of a channel which he was to dredge) was equally within the reach of both parties. In this case the information was peculiarly within the possession of the defendants. They knew, and were supposed to know, and must have known, to how many of these elevated railroad stations the mails were then carried. True it is that the advertisement declared that the bidders must inform themselves, and that no additional compensation would be allowed for mistakes, and that they must seek the postmaster for explanations. But here was an instance where the bidder might inform himself by reading with care the statement which the Department placed in his hands; and it was not a case which required the bidder to seek the postmaster for explanations, for nothing could be plainer than that which was stated; and it was not a case of mistake, for the matter

was understood precisely as it was written. A trivial error, such as saying that there were thirty stations when in fact there were thirty-one, might be called a mistake; but here there was no trivial error, but a plain misrepresentation of 100 per cent.

The purpose of the advertisement was to attract bidders and invite competition; and when the Department, to invite competition, volunteered to give bidders specific information of existing conditions within its own knowledge, and not within the knowledge of the bidders, it was bound to give them information upon which they could rely.

42 For the court to hold that such information so volunteered might be worthless and, as in this case, delusive, would be to warn all prudent persons out of the competitive market and thereby destroy effective competition. The court is of the opinion that the representation made by the Department in this matter of these elevated railroad stations must be deemed in the nature of a warranty.

There is a third cause of action, namely, that the contractor was compelled to carry the mails from the wagons up the stairs of the elevated roads and deliver them to the mail agents on the trains. It is contended that the service contracted for was wagon service, while this was foot service. The court nevertheless is of the opinion that the provision of the contract "to take the mail from and deliver it into the post-offices, mail stations, and cars" did not authorize the contractor to deliver the mails in the streets below the elevated roads and outside of the railroad stations, but cast upon him the burden of conveying them from the streets and of delivering them "into" the stations.

The judgment of the court is that the claimant recover for the service rendered in connection with the Industrial Building Branch of the postal service $68,483, and for the duplication of service to the Manhattan Railroad stations, $14,538, amounting in the aggregate to $83,021.

43–44 VI.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 25th day of April, A. D. 1904, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said The Utah, Nevada and California Stage Company do have and recover of and from the United States the sum of eighty-three thousand and twenty-one dollars ($83,021.00).

45–46 VII.—*Defendants' application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 25th day of April, 1904, in favor of claimant, the defendants, by their Attorney-General, on the 26th day of May, 1904, make application for and give notice of an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed May 26, 1904.
Allowed June 6, 1904.

C. C. NOTT, *Chief Justice.*

47–48 VIII.—*Claimant's application for and allowance of appeal.*

Comes now the claimant, above named, by its attorney of record, and prays the allowance of an appeal herein to the Supreme Court of the United States from so much and such parts of the judgment of the court, entered herein April 25, 1904, as adjudged that claimant was not entitled to recover for the certain services set forth and described in the findings of the Court Nos. XVII and XVIII, and in entering judgment in favor of defendant in respect of the claim for service embraced in said two findings.

A. A. HOEHLING, Jr.,
Attorney for Claimant.

Filed June 1, 1904.
Allowed June 10, 1904.

C. C. NOTT, *Chief Justice.*

49 Court of Claims.

The UTAH, NEVADA AND CALIFORNIA Stage Company
vs.
The UNITED STATES.
} No. 19738.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 20th day of June, A. D. 1904.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsed:) Office of the clerk, Supreme Court U. S. Received June 23, 1904.

(Indorsed on cover:) Court of Claims. File No. 19402. Term No., 302. The United States, appellant, vs. The Utah, Nevada & California Stage Company. File No., 19403, term No. 303. The Utah, Nevada & California Stage Company, appellant, vs. The United States. Filed June 23d, 1904. File Nos. 19402 & 19403.

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FILE COPY.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
THE UTAH, NEVADA AND CALIFORNIA Stage Company. } No. 51.

THE UTAH, NEVADA AND CALIFORNIA Stage Company, appellant,
v.
THE UNITED STATES. } No. 52.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

LOUIS A. FRANT,
Assistant Attorney-General.

JOSEPH STEWART.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
THE UTAH, NEVADA AND CALIFORNIA STAGE COMPANY. } No. 51.

THE UTAH, NEVADA AND CALIFORNIA STAGE COMPANY, appellant,
v.
THE UNITED STATES. } No. 52.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

THE CONTRACT PROVISIONS.

On September 15, 1892, the Postmaster-General caused to be published an advertisement inviting proposals for the performance of "covered regulation wagon mail messenger, transfer, and mail-station service" in the city of New York, N. Y., on mail route No. 207003, for the term from July 1, 1893, to June 30, 1897. (Findings of Fact, II, Rec., p. 17.)

This advertisement contained instructions to bidders, among which was the following:

> The contractors under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1893, or at any time thereafter during the contract term, whether between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations now established or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post-offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary by any other reason. Bids must be made with this distinct understanding, etc. (Findings of Fact, III, Rec., pp. 17, 18.)

And also the following:

> The foregoing schedule shows the service required August 15, 1892, as near as can be stated. Bidders must inform themselves of the amount and character of the service that will be required during the next contract term.
>
> The statements of probable additional service that may be necessary on the routes under this advertisement are given so that bidders may be as fully advised as possible of the amount likely to be required. It will not, however, limit the liability of the contractors to

perform all service that may become necessary without additional pay. (Findings of Fact, III, Rec., p. 17.)

And also the following:

Bidders must inform themselves of the distances, the running time, the weight of the mails, the condition of hills, streets, toll bridges, ferries, and obstructions of all kinds whereby expense may be incurred, and as to the probable increase, additional service, or changes likely to be rendered necessary. Claims for additional pay based on such grounds, or for alleged mistakes or misapprehensions as to the service required, or for bridges destroyed or ferries discontinued can not be considered. (Findings of Fact, III, Rec., p. 18.)

Pursuant to said advertisement the Utah, Nevada and California Stage Company submitted a proposal for the performance of the service therein described in the city of New York, N. Y., which was accepted by the Postmaster-General, and a contract was entered into accordingly. (Rec., p. 21.) Said contract is set forth in full on pages 6 to 11, inclusive, of the record.

The contract referred to the advertisement and made it a part of itself, and specifically stated that the contractor had been accepted to perform the service advertised, "and all new additional service of said kinds which may at any time during the term of this contract be required in said city." (Rec., p. 7.)

By the second covenant the claimant company contracted—

> To take the mail from and deliver it into the post-offices, mail stations, and cars at such points and at such hours, under the directions of the postmaster at New York, N. Y., approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage. (Rec., p. 8.)

By the tenth covenant the claimant company contracted—

> To perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster-General may order at the city of New York, N. Y., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date hereof or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance or extra wagons from time to time for special or advance trips as the Postmaster-General may require, as a part of such new or additional service. (Rec., p. 9.)

REQUIRED SERVICE TO STATION H.

In March, 1893, the United States rented the premises in Industrial Building at Forty-fourth street and Lexington avenue, for postal purposes in order to relieve the general post-office, the available space in which had become inadequate to accommodate the

increased volume of business. A postal station was established therein, and the contractor (the claimant company) was required to transport the mails between it and the various railroad stations and some postal stations. This postal station was constituted as follows:

Station H was moved May 1, 1893, from its location at No. 156 East Fifty-fourth street into the above-named premises.

Thereafter, on September 1, 1893, there was inaugurated in the same premises and in connection with Station H the distribution department, which was variously known as "Distribution Station," "Industrial Station," and "Station H (distribution department)," and the two together were sometimes known as "Industrial Branch Station."

Before and after the removal of Station H, as above stated, it was in all respects a branch post-office, at which there were collections and deliveries of mail by carriers, distribution of mail matter for dispatch, registration of letters, sale of stamps, and the issue of money orders.

Both that part of the industrial branch which had been known as Station H and that part which was referred to as "Distribution Station," etc., were situated on the same floor of the Industrial Building, and were at all times connected by a passageway. The former was in charge of a superintendent of station, and the latter was, until January 5, 1895, under the direction of an assistant of the superintendent of mails of the general post-office. Station H continued the collection and delivery of mails by carriers, the sale of

stamps, the registration of matter, and sale of money orders, while the distribution department had charge of the distribution of second, third, and fourth class matter. The collectors for Station H proper carried their collections of mail directly into and deposited them in the distribution department, and the distribution for dispatch and the assortment for city delivery were made there.

After the equipment of Industrial Branch Station, second-class mail matter mailed by publishers and originating north of Fourteenth street was mailed at that station.

This second-class mail matter had been previously mailed at the general post-office and at Station O, at which points the distribution had theretofore been made and dispatch made to the several railroad stations, as specifically stated in the advertisement. Thereafter no further mailing of second-class matter was made at Station O, and all dispatches of said mailed matter for the West and New England States and to and from Grand Central Station were made from the Industrial Branch Station, a distance of approximately six blocks, instead of from the general post-office, 3½ miles distant, and from Station O, 1¾ miles distant, as theretofore.

The congested state of the general post-office on account of lack of adequate space, for the remedy of which Station O had been established some years before, was well known for some time prior to the advertisement and proposal for this service. (Findings of Fact, XV, Rec., pp. 25, 26.)

No intimation or information was given by the officers of the United States to the claimant company, prior to the making of the bid or entering into the contract, that they contemplated or intended the establishment of a service at the Industrial Building. (Findings of Fact, XIV, Rec., p. 25.)

The rate of annual mileage performed in the New York service, based on the schedule stated in the advertisement, and in operation September 15, 1892, preceding the proposal and contract, was 973,674.22. The probable annual increase was stated as 6,718.40 miles. (Findings of Fact, VI, Rec., p. 21.) The order requiring the contractor to carry mails to and from Station H involved an additional annual rate of mileage of 311,939 miles (Findings of Fact, XI, Rec., p. 24) and the employment of a large increase in equipment (Findings of Fact, XII, Rec., p. 25) and the expenditure of additional ferry tolls. (Findings of Fact, XIII, Rec., p. 25.)

The Court of Claims found this new and additional service to be worth $68,483, and gave judgment in favor of the claimant company for that amount.

From this judgment the United States appealed.

SERVICE BETWEEN THE MANHATTAN ELEVATED RAILROAD STATIONS AND THE GENERAL POST-OFFICE AND BRANCH POST-OFFICES.

The "Instructions to bidders," a part of the advertisement, contained the statement that, "The foregoing schedule shows the service required August 15, 1892, as near as can be stated. Bidders must inform themselves of the amount and character of the service that

will be required during the next contract term." (Findings of Fact, III, Rec., p. 17.) The "Instructions" contained the further notice, "For information relative to the service and its requirements bidders are requested to apply to the postmaster at the city where the service is to be performed." (Findings of Fact, III, par. 28, Rec., p. 21.) The advertisement gave a schedule of service in operation August 15, 1892, "so that bidders may be as fully advised as possible of the amount of service likely to be required;" but inadvertently stated the service in operation on that date, between the Manhattan Elevated Railroad stations and the general post-office and certain branch post-offices, at but one-half the number of trips actually required. Consequently the claimant company was required to and did perform, under protest, the number of trips which were actually performed theretofore, but which were double the number thus specified. (Findings of Fact, XVI, Rec., p. 26.)

The claimant began the service as it in fact existed and had been previously performed, and performed it until January, 1894, before it made any protest. (Findings of Fact, XVI, Rec., p. 27.)

The Court of Claims found this service to be reasonably worth the sum of $14,538, and gave judgment in favor of the claimant company for such sum.

From this judgment the United States appealed.

THE SERVICE UP THE STAIRWAYS TO THE MANHATTAN ELEVATED RAILROAD COMPANY'S STATIONS.

The contract provided that the contractor should "take the mail from and deliver it into the post-office, mail stations, and cars," etc. (Rec., p. 8.)

The advertisement provided for service between the general post-office and mail stations and the Manhattan Elevated Railroad stations.

Said elevated railroad stations were not situated on the surface of the streets, but were at the same elevations as the railroad tracks, and could only be reached by ascending the steps from the surface of the streets provided and used for that purpose. Prior to the commencement of claimant's term of service it had been customary for the contractor generally to exchange the mail with the Government's messengers on the platform of the station at the door of the car.

Upon the commencement of the claimant's term of service it did, without protest, begin the performance of the service between the general post-office and the Manhattan Elevated Railroad station at Park place, and between postal branches O, E, G, W, J, D, F, H, and K, and the Manhattan Elevated Railroad stations at indicated streets, by the continuation of the method of such performance theretofore used under permission by the preceding contractor, namely, by messengers without wagons or carts in some cases, and by carts in others. Subsequently, in accordance with the manner adopted by the claimant as above stated, the Department formally authorized, by order, its performance in push carts.

Thereafter, at the request of claimant, permission was given allowing performance of a portion of said service by messengers without carts or wagons.

The performance of the service thus referred to included the carriage of the mail up and down the

stairways to and from the elevated stations, and no protest as to any portion of it was made by the claimant until mention was made by it in its letter received at the Post-Office Department January 30, 1894.

During most of and the latter part of the term of contract next preceding that of the claimant, and at the time of the issuance of the advertisement and the submission of claimant's proposal, the previous contractor had been required to and did perform this like service up and down the stairs to all elevated stations from all postal stations at which this service was then required. At certain terminal stations where the mails were heavy the postal employees, under instructions, assisted the contractor's employees in order to facilitate the dispatches, but in no wise to assume such service on the part of the Government. (Findings of Fact, XVIII, Rec., pp. 27, 28.)

The Court of Claims, being of opinion that the claimant was not entitled to recover, gave judgment in favor of the United States, from which the claimant company appealed.

ARGUMENT.

The three claims will be considered separately in the order in which they are named in the statement.

I.

SERVICE TO STATION H WAS "NEW OR ADDITIONAL SERVICE" OF THE KIND DESCRIBED IN THE CONTRACT.

The first claim is that for extra compensation for the performance of service to and from Station H. The facts are fully set forth at pages 4 to 7, *supra*.

The question involved in this claim is whether the requirement made upon the claimant contractor to perform service to and from the new postal station established in the Industrial Building at Forty-fourth street and Lexington avenue after the commencement of the claimant's term of service was "new or additional mail messenger or transfer service," which, under the terms of the advertisement and contract, is to be performed "without additional compensation" (Findings of Fact, III, Rec., p. 17), and is of the kind named in the advertisement. (Contract, Rec., p. 7.)

1. UPON THE FACTS.

The advertisement provided that the contractor would be required to perform, without additional compensation, any and all new or additional service that might be ordered at any time during the contract term, whether between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations established at the time of the advertisement or that might be established thereafter, whether caused by the *establishment of new or change of site of existing post-offices*, railroad stations, steamboat landings, or mail stations within the city of New York, etc. (Rec., pp. 17, 18.)

This became a part of the contract, and the contract further provided that the contractor should perform all new or additional service of the kind named in the advertisement. (Rec., p. 7.)

The facts show clearly that the service required was new or additional service of the same kind as that

named in the advertisement. Service was specifically provided for between the general post-office and mail stations, and the various railroad stations. The service complained of was to and from a new mail station in Industrial Building at Forty-fourth street and Lexington avenue, which was constituted by Station H, removed thence from its old location at No. 156 East Fifty-fourth street, and the inauguration in connection therewith of the distribution department in which the distribution of certain mails was made which had theretofore been made at the general post-office and Station O.

This new station was a mail station in every sense of the term, and therefore clearly within the language of the contract. Station H after removal performed the same mail functions as before removal, continuing the collection and delivery of mail by carriers, the sale of stamps, the registration of matter, and the sale of money orders. The distribution department had charge of the distribution of second, third, and fourth class matter. The whole work was conducted as one station. The collectors for Station H proper carried their mails directly into and deposited them in the distribution department where the distribution for city delivery was made. (Findings of Fact, XV, Rec., pp. 25, 26.)

2. UPON THE AUTHORITIES.

Upon the authorities, also, it is clear that service to this new mail station was new or additional service of the same kind as that specifically named. The question as to what is "new or additional" service of the

"kind" named in such advertisement and contract has been determined by the courts in similar cases under similar contracts, to some extent. In the *Woolverton case* (27 C. Cls. R., 292), it was held that the word "additional" would not transfer to the wagon service a service already in existence as a separate route and performed by other means at the time of the advertisement. Also, in the *Woolverton case* (34 C. Cls. R., 247), "mail-messenger service" was held not to include the transportation of gold; and that "mail stations" did not include street boxes and substations differing in no substantial respect from street boxes, a "substation" being distinct from a "branch post-office" or "mail station" under the law governing the Post-Office Department. In the *Union Transfer Company case* (36 C. Cls. R., 216), it was held that a new system of "receiving stations" (substantially the same as the "substations" in the *Woolverton case*) was not included, but that *new branch post-offices or full mail stations were.* In the case of *Slavens* v. *United States* (196 U. S., 229), but recently before this court, it was held that the requirement to take the mail to and from street cars, met at crossings, instead of landings and stations, was service of the same kind as described, and came within the power to order reserved to the Postmaster-General.

The principle declared in all these cases, as well as the specific dictum regarding the mail stations in the *Union Transfer Company case* and the opinion regarding the service to street cars in the *Slavens case*, sustains the contentions of the United States here.

3. THE CHANGED POSTAL CONDITIONS AND THE ACTION OF THE POSTMASTER-GENERAL TO MEET THEM DID NOT CREATE A NEW SUBJECT-MATTER NOT CONTEMPLATED BY THE CONTRACT.

The Court of Claims, in its opinion in this case when before it (Rec., p. 28), conceded that this service was in form "new or additional," but held that it was in substance different in "kind," because it was incidental to the introduction of a condition into the city postal service which had never been there before—the establishment of a new post-office system, as claimed.

Therefore it is proper to consider the question whether the character of this station and the circumstances of its establishment created a condition which was not within the contemplation or intent of the contract.

(*a*) *Such an emergency was specifically provided for.*

The facts found by the court regarding the establishment have been set forth in the statement *supra*. At the time of the advertisement and the proposal for service there was no mail station at Forty-fourth street and Lexington avenue. Station H was at that time located at No. 156 East Fifty-fourth street. The general post-office was then and had been for some time in a congested state on account of the lack of adequate space. Station O, situated 1¾ miles distant from the location of the new mail station in question, but nearer the general post-office, had been established some years before to remedy a like condition. These facts were well known for some time prior to the advertisement and proposal for this service. By act of March 3, 1893

(27 Stat., p. 732), Congress authorized the renting of a building to be used for general post-office business. The Department rented space in the Industrial Building at Forty-fourth street and Lexington avenue, and moved Station H from its old location to this one, and inaugurated, in connection therewith, the distribution department which cared for the second-class mail collected north of Fourteenth street. This second-class mail had previously been deposited at the general post-office and at Station O, which had theretofore been established for a similar purpose. Station H at its new location performed the same postal functions as did Station H at its old location. The only change in the character of the station was the transfer to it of the distribution of second-class mail originating north of Fourteenth street and theretofore distributed at the general post-office and Station O.

There does not appear to be anything in these facts which creates a condition not contemplated by the contract. The advertisement warned bidders that the contractor would be required to perform all new or additional service between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations now established *or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post-offices*, railroad stations, steamboat landings, *or mail stations*, within the city, *or caused by the alteration of the route made necessary by any other reason.* (Par. 2, Instructions to Bidders, Rec., pp. 17, 18.) The contract made this a part of itself and further provided that the contractor

should perform all new or additional service of the kind named. (Rec., p. 7.) Whether the new station be regarded as a change of site of Station H, or the establishment of a new station, the emergency could not have been more specifically provided for by general terms in the advertisement and contract.

(*b*) *The transfer of work from the general post-office to the new station was a natural and proper incident to its establishment.*

But it has been urged that the fact that certain work theretofore done at the general post-office (the distribution of certain second-class mail) was transferred to this new station, thus requiring the hauling of mail from the new station which had theretofore been hauled from the general post-office, distinguishes this from the case of a station contemplated by the contract.

This contention does not appear to be tenable. The establishment of a new mail station must always follow a postal necessity. There is always existing need and existing business to be cared for. It is not established solely in anticipation of future or nonexistent postal business. It will in every case transact postal business which, in the absence of such establishment, would be transacted at some existing post-office or mail station. Such was true in this case, and no other or different service was performed at the new location of Station H than had been theretofore performed at the old location of Station H, and at the general post-office, and Station O.

If it be contended that the establishment of a new mail station does not contemplate the transfer to it of postal functions performed by existing post-offices or mail stations, it may be answered that the widest discretion is reserved to the Postmaster-General in the same paragraph of the advertisement, where it is provided that the contractor shall perform the required additional service "whether caused by the establishment of new or change of site of existing post-offices * * * mail stations" * * * "*or caused by the alteration of the routes made necessary by any other reason.*"

Was the transfer of the second-class mail originating north of Fourteenth street from the jurisdiction of the general post-office and Station O to Station H at its new location a fair and reasonable exercise of this reserved discretion? The United States insists that it was; that the necessities of a postal service in a large city where population, business, and transportation conditions are continually changing require the exercise of a power in the Postmaster-General to so readjust postal facilities as to meet such changing conditions. In this case the act was no other than the change of the boundary of collection territories which were tributary to the general post-office and the mail stations north of it. Fourteenth street was fixed upon as the line, and all second-class mail collected north of it was deposited at new location of Station H instead of at the general post-office and Station O.

(c) *Such establishment of a station and the transfer thereto of functions theretofore performed by the general post-office was not an anomaly in service.*

This was not an anomaly in the mail service of New York City. Some years before a like emergency arose, the general post-office was crowded by reason of the growth of the service, and it became necessary to relieve the congestion. Station O was established for the purpose of handling the second-class mail originating at the large publishing houses in its vicinity, and which theretofore was deposited at the general post-office and hauled thence by the contractor. The question of the right to recover additional compensation for the service from Station O came before the Court of Claims in the case of *Woolverton* v. *The United States* (34 C. Cls. R., 270), and was decided adversely to the claimant. That was, in principle, identical with the question involved here, and if the establishment of Station O did not create a new post-office system and thereby entitle a recovery in the *Woolverton case*, the establishment or the removal of Station H to the new location in the Industrial Building did not create a new post-office system in this case. The finding of fact and the opinion of the court in the *Woolverton case* are instructive here. The court found as follows:

> About the 15th of May, 1890, the Postmaster-General established what he called a branch post-office "Station O," New York City. No mail was there received for city delivery. This

station received only mail to be sent out of the city; from this Station O, a portion of the mail there received was carried directly to the railway stations and to the general post-office, instead of being first carried to a mail station. The other portion of the mail was carried to mail stations. Station O was established close to the large publishing houses of New York City, and was so placed to enable them to mail their publications without carrying them to the principal post-office. All classes of mail were received at this office. The sale of stamps there from May 1, 1890, to June 30, 1893, was $728,174.12; the number of money orders issued during said period was 70,966; the amount of general business transacted was $457,750.55; receipts on second-class mail matter, not including the sale of stamps, was $309,738.72. No mail was delivered at this office "O" or from it. But for the existence of this office second-class matter there deposited must have been mailed at the general post-office. The distance from this station to the Pennsylvania Railroad Station is 2.34 miles, the distance from the general post-office to the Pennsylvania Railroad Station is 1.45 miles, the distance from Station O to the Grand Central Station is 1.81 miles, the distance from the general post-office to the Grand Central Station is 5.45 miles. The second-class matter carried from this station to the Grand Central Station is in excess of that carried to the Pennsylvania Station.

Because of the establishment of this Station O plaintiff hauled the mails as shown in the

following schedule. This service if outside the contract was of the value set opposite thereof. (34 C. Cls. R., 262.)

Here follows the schedule, with the total value of the service stated as $68,916.

It will be noted that the essential relevant facts in the Station O case were identical in character with those in the case at bar. The postal emergency was the same; it was necessary to have a mail station nearer than the general post-office to the large publishing houses to care for the second-class mail originating therein. In each case the mail station was to receive such second-class mail which had theretofore been deposited by the publishers at the general post-office. In each case this was an administrative change from an existing practice of handling certain mails at the general post-office to one of handling the same mails at a newly located mail station. In each case it was this particular mail which necessitated the large part of the service for which claim was made. In each case the court found the services to be of about the same value—$68,916 in the case of Station O and $68,483 in the case of Station H, the case at bar.

In the judgment in the Station O case, the Court of Claims say:

> Station O did not substantially differ from other branch post-offices. Plaintiff must have carried this mail in any event. If this branch had not been established the mail would have been sent to the general post-office or a sub-station, whence (under his contract) he must

> have transported it to the railway stations or the post-office or the wharves. In fact, it seems (in so far as distance is concerned) that he gained by the measure. Instead of carrying New York Central mail down to the central post-office, thence back to the railway station, he carried it direct to the station. So also with the Pennsylvania Railway mail. (34 C. Cls. R., 270, 271.)

The *Woolverton case* was not appealed, and it was but reasonable that the Postmaster-General should rely upon the statement of law as given by the court respecting Station O, and when the same condition which necessitated the establishment of Station O again arose, should believe he had the right under an exactly similar contract to establish new Station H for a like purpose, and require the contractor to perform the service.

(*d*) *Neither the volume of the new service nor a change in the postal policy is material, provided the new service is clearly within the description of service named in the contract.*

When the case at bar was before the Court of Claims the amount of the service required on account of the new station H appears to have impressed that court with the theory that the service became different in "kind" from that which was described in the contract, and therefore was not a part of the subject of the contract. It was found that the contractor's equipment was considerably increased, and a large number of additional miles per annum were required in the performance of the service.

It is not apparent why this fact should control the question. There is no limitation expressed or implied by the advertisement or contract. On the contrary, the provisions express the opposite. The contractor is warned in the second paragraph of the "Instructions" that he will be required to perform "any and all new or additional service." There has never heretofore been any intimation in the adjudicated cases arising under these contracts that the amount of service was material, but, on the other hand, it has been expressly held that it is not, provided it is within the description of the service specified in the agreement. In the *Union Transfer Company's case* (36 C. Cls. R., 216), the Postmaster-General increased the number of mail stations in Philadelphia during the claimant's contract from four to twelve and required performance of service to and from them. The court held that the service was properly required under the terms of the contract and said:

> The increase of the service from a period of about eight months from the time the contract went into operation was so large and material it would be unjust to claimant to say that such service was contemplated by the parties; and to justify the Department in making an increase of that magnitude the service must be brought clearly within the description of the service specified in the agreement. (*Id.*, p. 227.)

It must be borne in mind, also, that the *Union Transfer Company's case*, in which this opinion was rendered, was one in which there was as great or greater change in

the administrative policy of the Post-Office Department as there is claimed to have been in the case at bar. At the time of the advertisement and contract there was a "van service" maintained in the city of Philadelphia, Pa., by the Department for the purpose of carrying the mails and the letter carriers from the main post-office to various parts of the city and to carry the carriers back to the main office with mail collected. Under this system all mail for transportation out of the city was assembled at the main post-office (except such as was brought to four branch post-offices), and the carriers' mail was also given them at the main post-office and they were carried to different parts of the city by this van service. (*Id.*, p. 218.) The court found the following further fact in that case:

> After the contract had been in operation for nearly a year, and mail had been carried on the lines that had existed with respect to the mail transportation in the city of Philadelphia, the Postmaster-General determined upon a change and established receiving stations and substations at various points in the city, where mail matter could be deposited for dispatch, and also to do away with the van service and establish in its place full stations or branch post-offices, where mail could be received as well as dispatched. Under this change the Postmaster-General from time to time during the contract period established seventeen stations called receiving stations, five stations called substations, which were subsequently made full stations, and eight full stations or branch post-offices, aggregating thirty additional places, to which

he required the claimant to make trips, and discontinued the van service by reason of said change of system. (Id., p. 219.)

Notwithstanding the fact that this was a more radical change in the postal administrative system of Philadelphia than was the change in New York, the court held that in so far as the full mail stations were concerned it was such a change as was contemplated by the contract.

So, also, in the *Woolverton case* (*supra*), the court found the value of the service to and from Station O to be $68,916, while the value of the service to Station H in the present case was found to be $68,483. Yet the volume of the service in the *Woolverton case* did not decide it against the United States. And in that case a similar change in the scheme of postal administration was made in New York, and for a like reason, as shown above.

It is suggested further that, if for any purpose it is proper to consider the increased volume of service, note should be also taken of the features of advantage to the contractor. While it is true that the new service required more equipment, identically the same mails were hauled and much of them over shorter distances. Before the change all second-class mail for the West and New England States was hauled from the general post-office and Station O to the Grand Central Station, a distance of 3½ miles from the former and 1¾ miles from the latter. After the change all these mails which were received at Station H instead, were hauled to Grand Central Station only six blocks. (Findings of Fact XV, Rec., p. 26.)

(e) *Evident purpose of the contract provisions.*

No view of the subject is complete without a consideration of the character of the subject-matter of these contracts with reference to the growth of cities and the inevitable changes in postal needs. Such service is designed to effect the transportation of the incoming and the outgoing mails between railroad stations and steamboat landings and the general post-office and all mail stations, between such post-office and mail stations and electric, cable, or other street car stations or points of exchange therewith, between the general post-office and the mail stations, and the necessary transfers between depots, stations, etc. The contract term is four years, and during such an extended period many changes must necessarily occur as a result of the inevitable growth in the city, the changes in railroad or steamboat lines, and stations and wharves, and the necessary establishment of new branch post-offices or mail stations to meet the increasing needs of the people. The general post-office may increase in its volume of business so greatly as to require a new building, or the establishment elsewhere of a mail station specially intended to effect its relief and care for the new conditions. New railroad lines may build, or old terminals change their locations. New street-car lines may be constructed. New and additional mail stations are almost certain to be established, or the location of existing ones changed. Such are changes in conditions in cities with which everybody at all familiar with postal and transportation matters

must know are not only probable, but almost certain to occur.

The broad terms and provisions of the advertisement and the contract which were designed to meet these conditions have been fully detailed. It must be apparent that the purpose of these provisions is to provide a contract which shall be sufficiently flexible to meet such conditions. This is not only shown by an examination of the provisions, but by the history of the litigation arising out of these contracts and the judgments of the courts in the cases.

(f) Special notice of possible changes to bidder not required.

The Court of Claims found as a fact that no intimation or information was given the claimant prior to making the bid or entering into the contract that the establishment of the new station was contemplated. This is immaterial, however, in view of the fact that it was not shown that the Postmaster-General had formed any definite purpose or plan respecting the establishment, and the further fact that the court also found that the congested state of the general post-office on account of lack of adequate space, for the remedy of which Station O had been established some years before, was well known for some time prior to the advertisement and proposal. (Findings of Fact, XV, Rec., p. 26.)

The absence of specific information respecting future changes, even where inquiry has been made, has not been held to prejudice the rights of the United States.

In the *Union Transfer Company's case* (*supra*), the court found, on this point, as follows:

> The claimant's superintendent, in accordance with the instructions to bidders and before submitting its bid, called at the post-office at Philadelphia for "information in regard to the service (advertised for) and its requirements," and was informed by the superintendent of mails, who had charge of said service, as to the proportional increase of service heretofore, but no suggestion was made to claimant's superintendent and no inquiry was made by him as to any proposed change of system, nor was any known to said superintendent of mails at the time or contemplated by the Post-Office Department. The superintendent of mails gave the superintendent of the company the information that he got from the previous service in regard to the proportion of increase, which was that he supposed there would be the usual increase during the term. (36 C. Cls. R., p. 218.)

Notwithstanding this the court held that the claimant in that case was not entitled to recover for the service to supply the increased number of full stations from four to twelve resulting from a radical change in the postal system of the city of Philadelphia.

In view of all these considerations it is submitted that this service was "new and additional" and of the kind named in the advertisement and contract, that the claimant is not entitled to judgment for its value, and, therefore, that the judgment of the Court of Claims should be reversed.

II.

THE STATEMENT MADE BY THE POST-OFFICE DEPARTMENT OF THE NUMBER OF TRIPS BEING PERFORMED BETWEEN THE MANHATTAN ELEVATED RAILROAD STATIONS AND THE GENERAL POST-OFFICE AND MAIL STATIONS AT THE TIME THE ADVERTISEMENT WAS ISSUED WAS NOT A WARRANTY.

The second claim is for compensation for carrying the mails between the Manhattan Elevated Railroad stations and the general post-office and branch post-offices, upon trips which exceeded in number that stated in the advertisement as in operation at the time the advertisement was issued. The facts are fully set forth at pages 7 and 8 (*supra*).

The question involved is whether the statement made by the Post-Office Department in the advertisement that a specific number of trips were made to these elevated railroad stations, when in fact there were double the number being performed, was, under all the circumstances, a warranty on the part of the United States that only that number was being performed. The Court of Claims said that "when the Department, to invite competition, volunteered to give bidders specific information of existing conditions within its own knowledge, and not within the knowledge of the bidders, it was bound to give them information upon which they could rely," and held that the United States were bound by the statement, though inadvertently made.

If the fact were simply that the Department made a representation of a fact within its knowledge and which could not otherwise be known to the bidder, and that it was expected to take the substance of that

representation as final in arriving at an estimate of the service it would be expected to perform, the position taken by the Court of Claims would be conceded.

But the facts are very different. There was no duty on the part of the Department to give the information, and it volunteered it in order that all information in its possession should be placed before bidders. Its purpose was to give it correctly, but inadvertently one-half the number of trips actually being performed at the time were omitted. The statement was made in connection with it as follows:

> The foregoing schedule shows the service required August 15, 1892, as near as can be stated. Bidders must inform themselves of the amount and character of the service that will be required during the next contract term. (Rec., p. 17.)

Further instruction was given the bidder, as follows:

> For information relative to the service and its requirement bidders are requested to apply to the postmaster at the city where the service is to be performed. (Findings of Fact, III, par. 28, Rec., p. 21.)

There is no evidence in this statement that the schedule was intended to be stated with absolute accuracy. On the contrary the language throughout indicates that it was a gratuitous approximation, and the bidder was specifically warned and required to make inquiry as to the *amount and character of the service that would be required.* "*Bidders must inform themselves,*"

etc. The inference is unavoidable that the Department did not attempt to give the bidder information upon which he could rely without further inquiry. The warning is meaningless if that were true.

Further, it must be presumed that it was possible for the bidder to inform himself with reference to the subject upon which the warning was given. It can not be assumed that the Department included a requirement which was impossible. As a matter of common knowledge it must be admitted that all the bidder had to do to learn the exact number of trips being performed at the time he made his bid, which was sometime after August 15, 1892, was to make personal inquiry of the postmaster in the New York post-office, to whom the advertisement specifically referred him, or personally observe the conditions at the several elevated stations. This duty was devolved upon him by the instruction in the advertisement, and *no mistake of the Department which could have been discovered by a compliance with that duty can be set up as the basis of a claim for recovery.* That would be allowing the claimant to take advantage of his own laches.

The authorities sustain the contention that the statement made by the Department was not a warranty. In the case of *Burgwyn* v. *The United States* (34 C. Cls. R., 348), where the claimant had contracted to dredge the Cape Fear River, the specifications issued by the Government and on which claimant relied, contained errors relating to the quantities of material to be excavated. By reason of reliance on the specifications

the claimant underestimated the cost of the work. The court dismissed the petition, and said:

> To entitle the claimant to recover, he must show that the Government, by the specifications submitted for the information of bidders, thereby became a guarantor in respect of the correctness of the approximate quantities of material to be excavated.
>
> Paragraph 33 of the specifications, under the head of "General instructions for bidders," reads:
>
> "It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings and are invited to make the estimate of quantities for themselves." * * *
>
> Had this been done, there can be no question but that the errors complained of would have been discovered by the claimant, as they were by others. (*Id.*, 356.)

The parallel between the facts of the cases is apparent. The specifications in each case were intended to be approximately correct, but were erroneous. The bidder was required in each case to inform himself. But though the Court of Claims dismissed the petition in the *Burgwyn case*, it gave the claimant herein judgment, on the theory that the facts represented were peculiarly within the knowledge of the Department and the representation became a warranty. It is submitted that there is no evidence of a warranty in the

case at bar and that, had the claimant company attempted to inform itself, as required by the instructions, the error in the Department's statement would have been immediately discovered.

A somewhat similar question came before this court in the case of *Simpson* v. *United States* (172 U. S., 372). There had been provision made for the building of a dry dock at Brooklyn, and the Navy Department addressed a letter to the commandant of the Brooklyn Navy-Yard directing him to cause the necessary borings to be made to ascertain the nature of the soil to be excavated as well as to what depth, if any, below the line of water mark it would be necessary to have the piling driven to secure a proper foundation, "to enable the dry-dock builders who may apply at the yard under your command for information," etc.

The result of the borings was delineated on a profile plan purporting to show the character of the underlying soil, and indicated that the soil at the point referred to was stable and contained no quicksand. Simpson & Co. applied for information, and a copy of the plan was furnished them. The contract subsequently made did not refer to this plan.

In the execution of the work quicksand was encountered, which delayed it and made it much more expensive to the contractor than it would otherwise have been. This court held that there was no express or implied warranty in the contract as to the character of the soil.

A further material point in connection with this claim must not be overlooked, and that is that at the

beginning of the term of the claimant's contract it began the service as it existed at the time and had been previously performed by the preceding contractor and performed it without objection or protest from the beginning of such contract term in July, 1893, until the following January in 1894, at which time a protest was made against its performance. Is it at all probable that if the claimant had not informed itself prior to the beginning of this service as to the actual amount of service performed by the previous contractor and being performed at the time of the advertisement and of its bid, it would have begun the service on July 1, 1893, and performed it without objection for six months? Is it not more reasonable to suppose that the contractor, who had had extensive experience in contracting for mail service in large cities and elsewhere, as the testimony of the principal officer of this company shows himself to have had, did in fact make careful inquiry with reference to the service being performed at the time the advertisement was issued or the bid was submitted, in accordance with the instructions given by the Department, and was thoroughly acquainted with the fact that the service required was greater than that which the erroneous statement in the specifications had stated?

From these considerations it appears that there was no duty on the part of the Post-Office Department to give the information in question; that though such information was peculiarly within its own knowledge it was subject to verification or discovery by the claimant upon an entirely practicable investigation; that

the representations made by the Department were voluntarily made and in a form to indicate that the estimate was an approximation; that the claimant was warned that it must inform itself with reference to the amount and character of the service to be performed under the contract; that it was instructed to make inquiry of the postmaster for further information; that if it had regarded the warning and followed the instructions the true number of trips being performed would undoubtedly have been discovered; and that the claimant entered upon its contract and continued for six months performing all the additional service complained of without objection or protest, thus indicating that it was probably in possession of the information at the time it submitted its proposal as to the true number of trips being performed.

In view of all these circumstances, it is submitted that the statement made by the Department was not in the nature of a warranty, that the claimant had no right to rely upon it as such and disregard the instructions given to inform itself, and that, therefore, the Court of Claims erred in giving judgment against the United States upon this claim, and such judgment should be reversed.

III.

THE SERVICE UP THE STAIRWAYS TO THE MANHATTAN ELEVATED RAILROAD STATIONS WAS NECESSARY TO A PERFORMANCE OF THE SERVICE AS CONTRACTED FOR.

The third claim is for compensation for carrying the mail up the stairways and delivering it to the Manhattan Elevated Railroad Company at its stations on the

said elevated railroad and receiving mail there and carrying it down the stairs. The facts are fully set forth at pages 8 to 10 (*supra*).

The question involved is whether the duty of the contractor ceased with a delivery and receipt of the mails at the foot of the stairs leading up from the street to the elevation of the station, or whether it required it to carry the mail up the stairs and deliver it into the cars and receive mail there and carry it down the stairs.

The claimant had contracted to carry the mail between various mail stations and the elevated railroad stations (Findings of Fact, XVI, XVII, Rec., pp. 26, 27), and "to take the mail from and deliver it into the post-offices, mail stations, and cars," etc. (Second covenant of contract, Rec., p. 8.)

It is a mere question of what were the "stations" of the elevated railroad. The Court of Claims has settled the question conclusively by finding as a fact that:

> Said elevated railroad stations were not situated on the surface of the streets, but were at the same elevation as the railroad tracks, and could only be reached by ascending the steps from the surface of the streets provided and used for that purpose." (Finding of Fact, XVIII, Rec., p. 27.)

There is no room left for contention. The advertisement required service to the elevated-railroad stations; the Court of Claims has found as a fact that these "stations" were at the same elevation as the railroad tracks and could only be reached by the stairs

from the street; and the contract provided for the delivery of the mail into the cars.

The Court of Claims dismissed the claim with these words:

> It is contended that the service contracted for was wagon service, while this was foot service. The court nevertheless is of opinion that the provision of the contract "to take the mail from and deliver it into the post-offices, mail stations, and cars" did not authorize the contractor to deliver the mails in the streets below the elevated roads and outside of the railroad stations, but cast upon him the burden of conveying them from the streets and of delivering them "into" the stations. (Rec., p. 32.)

All the facts connected with the performance of this service indicate beyond a reasonable doubt that this was the intention of the contract. Prior to the commencement of claimant's term of service it had been customary for the contractor generally to exchange the mail with the Government's messengers on the platform of the station at the door of the car. The previous contractor had been required by the Department and did perform this service up and down the stairs at these several elevated stations. Upon the commencement of the claimant's term of service it began and continued without protest the performance of this service between the mail stations and the elevated-railroad stations in the same manner and by the same method theretofore used by the previous contractor, under permission of the Department, namely, by messengers without wagons or carts in

some cases and by carts in others, and afterwards, at its own request, received permission to perform a portion of it by messenger without carts or wagons. No protest as to any portion of the service was made until January 30, 1894. (Findings of Fact, XVIII, Rec., pp. 27, 28.)

These facts also discredit any contention that the service contracted for was an exclusively wagon service.

It must be presumed, too, that if the claimant followed the instructions to apply to the postmaster "for information relative to the service and its requirements" (par. 28 of instructions, Rec., p. 21), it would have been fully advised as to the manner in which the then contractor was performing the service, and as to what would be required under the new contract.

It is submitted that the judgment of the Court of Claims dismissing this claim should be affirmed.

LOUIS A. PRADT,
Assistant Attorney-General.

JOSEPH STEWART.

O

Supreme Court of the United States.

OCTOBER TERM, 1905.

UNITED STATES, APPELLANT. *v.* UTAH, NEVADA & CALIFORNIA STAGE CO.	*No.* 51.
UTAH, NEVADA & CALIFORNIA STAGE CO., APPELLANT, *v.* UNITED STATES.	*No.* 52.

APPEALS FROM THE COURT OF CLAIMS.

STATEMENT.

This case was commenced in the Court of Claims by the Utah, Nevada & California Stage Co., contractor, during the term covered by the petition, for carrying

the mails in the City of New York. The contract is set out in the record (Exhibit "C," *R.* 6, *et seq.*).

There is no claim on the part of the United States that the services required by the contract were not rendered. The case turns entirely on the contention of claimant that it performed, under protest, services, by direction of the Post-office Department, which were not required by its written engagement. To this contention, defendant replies that all services rendered by claimant were within the requirements of the contract. To understand the issues, therefore, some reference must be made to the terms and conditions of said contract.

The Post-office Department issued an advertisement, dated September 15, 1892, for proposals, or bids, for carrying the mails in New York City for the term of four years, beginning July 1, 1893. This advertisement is referred to in the contract and made a part of the same. The formal part (of such advertisement) is set forth in Exhibit "A" (*R.* 5.). It states, in substance, that proposals would be received at the Department untl December 1, 1892, for carrying the mails during said term in New York City "in the covered regulation wagons prescribed by the Department"; "being covered regulation wagon mail messenger, transfer, and mail station service," "between the post-office and railroad stations, between the post-office and steamboat landings, between the post-office and mail stations, and between the several railroad stations, steamboat landings, and mail stations," as such service was described in detail in subsequent pages of said advertisement.

The New York City route was numbered 207003.

Under this number (on pages 14, *et seq.*, of the advertisement) the Department undertook to give schedules of the service in operation in said city on August 15, 1892. This was to enable bidders for the then coming term to judge of the scope of the required work and make intelligent bids.

The first of these schedules is entitled "Mail Messenger Service," and purports to give the destination, number of trips, and required running time, from the city post-office to certain railroad stations and steamboat landings, and from these latter points, back to the post-office.

The second schedule, entitled "Transfer Service," purports to give similar information as to destination, number of trips, and running time between the various railroad stations and steamboat landings.

The third schedule, entitled "Mail Station Service," gives similar information as to destination, trips, and time, between the city post-office and the various branch offices and sub-stations throughout the city.

A fourth schedule is entitled "Probable Additional Service," and discloses, by computation, that the probable annual increase will add 6,718.40 miles to the runs as thus established.

Thus the advertisement provided for three distinct mail-carrying services within the city, to wit, Mail Messenger, Transfer, and Mail Station services; *the 1st* (Mail Messenger Service) relating exclusively to carrying the mails back and forth between the city post-office and the railroad stations and steamboat landings; *the 2d* (Transfer Service) to carrying the mails from the various railroad stations and steamboat landings; and *the 3d* (Mail Station Service) to carrying

the mails between the city post-office and the various branch post-offices and stations on the city railways. (In the record, the city post-office is usually called "the general post-office.")

In addition to the requirements growing out of this advertisement, the contract proper provides, among other things:

1st. That the contractor was to take the mail from and deliver it into the post-offices, mail stations, and cars at such points and at such hours under the direction of the postmaster at New York, approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for toll and ferriage.

2d. That it was to furnish a number of regulation wagons that, in the opinion of the postmaster at New York, will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.

3d. It was to perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster-General might order at the City of New York, during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date thereof or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General may require, as a part of such new or additional service.

4th. It was also provided that the Postmaster-General might change the schedule and termini of the routes, vary the routes, increasing, decreasing, or extending the service thereon without change of pay. (*R.* 8–9.)

5th. In "Instructions to bidders," found at the end of the printed advertisement (Find. III, *R.* 17), and which may probably be construed a part of it, is found the following: "Bidders must inform themselves as to distances, running time, the weight of the mails, the condition of hills, streets, toll bridges, ferries, and obstructions of all kinds whereby expenses may be incurred, and as to the *probable increase, additional service, or changes likely to be rendered necessary.* Claims for additional pay based on such grounds, or for alleged mistakes or misapprehensions as to the service required, or for bridges destroyed or ferries discontinued, cannot be considered." (*R.* 18, *par.* 6.)

6th. In these "Instructions" is also found the statement that "all services should be performed in regulation wagons, unless otherwise mentioned in statement of route."

In these provisions of the advertisement and the contract are found all the limitations of any importance on which the defendant can rely to defeat petitioner's claim.

The Findings of Fact.

The court below found the facts practically as requested by petitioner. (*R.* 17, *et seq.*) The Instructions to Bidders are set out in full in Finding III. The other Findings important in determining the points involved are:

VI. "At the time of the advertisement for proposals aforesaid, September 15, 1892, the service therein referred to and hereinafter particularly described, involved a transportation of the mails of, approximately, 973,674.22 miles per annum, and in said advertisement bidders were notified that the probable annual increase in said service would amount to 6,718.40 miles per annum, as shown by Exhibit B, attached to said petition." (*R.* 21.)

VII. "Between the date of said advertisement for proposals (September 15, 1892) and the time when the claimant under his said contract was to commence the performance thereof (namely, July 1, 1893), additional service was required which increased the amount of annual mileage on said last-named date to 1,012,604.54 miles." (*R.* 22.)

VIII. This Finding gives in extenso the departmental orders of August 22, and October 23, 1893, directing the petitioner "to perform additional mail messenger service for the supply of distribution station, Forty-fourth Street and Lexington Avenue," "without additional pay, in accordance with the terms of his contract." (*R.* 22–24.)

IX. This Finding indicates the character of mail that was to be gathered into this distribution station, and the district or territory from which the same was to be gathered. (*R.* 24.)

X. This Finding declares that the orders set out in VIII required claimant to carry the mails from said new station ("known in the record as the Industrial Building Station") "direct to the various railroad stations and other points to which mail was then being carried from the general post-office. The aggregate distances from the Industrial Building to the railroad stations and other points, as given in said orders, is

27.28 miles; the aggregate of distances from the general post-office to the same railroad stations and other points is 20.85 miles." (*R.* 24.)

XI. This Finding reads as follows:

"The result of the orders aforesaid was that complainant was compelled to increase the number of wagon trips from October 25, 1893, to February 6, 1895, over and above what wonld have been the normal increase; and increased the distance to be traveled by the wagons over and above the normal increase, 311,939 miles for the period from October 5, 1893, to Feburary 6, 0895." (*R.* 24.)

XII. This Finding it as follows:

"By establishing the distribution station in the Industrial Building, and issuing the orders above set forth, there was no diminution in the number and character of the runs to and from the general post-office, nor was the mileage at said general post-office thereby diminished. To perform this extra service to and from the Industrial Building the claimant was required to purchase from 80 to 100 additional horses, and from 32 to 33 additional wagons; to put on from 45 to 46 new runs, and to employ from 33 to 50 additional men, drivers, hostlers, etc. The orders resulted in such increased speed in carrying the mails from the Industrial Building to some of the railroad stations that in obeying them it was necessary to violate the city ordinances as to the rate of speed; it largely increased the wear and tear on the wagons; it injured and shortened the period of usefulness of the horses, some of them dying from overexertion in hot weather by reason of the fast driving made necessary by the short time allowed to make the various trips." (*R.* 25.)

XIII. "The increase of runs to the railroad stations outside the city of New York, made necessary by the establishment of the extra service from the Industrial building, increased the necessary expenditure by claimant, in the matter of ferry tolls, in the sum of $9,950.22.

"The additional service trips, during the period aforesaid, made by the claimant, under the requirements of the orders above stated, in Finding VIII, were worth, at a fair and reasonable compensation, including therein the expense of ferry t[illegible], the sum of $68,483." (*R.* 25.)

XIV. "At no time prior to making said bid, or prior to entering into said contract, was any intimation or information given by the defendants' officers to claimant that they contemplated or intended the establishment of a service at the Industrial Building." (*R.* 25.)

XV. This Finding was made, as stated therein, at the request of defendant. It states that the Industrial Building was rented by the Government "for postal purposes in order to relieve the general post-office, the available space in which had become inadequate to accommodate the increased volume of business"; that the "contractor was required to transport the mails between it and the various railroad stations and some postal stations;" shows the distinction between Station H, which was located in the same building, and the "Distribution Station"; that Station H was in charge "of a superintendent of stations"; while the distribution station was "under the direction of an assistant of the superintendent of mails of the general post-office," which separate management was continued to January 5, 1895, being about the time

covered by this suit; that Station H, as thus located in the Industrial Building "continued the collection and delivery of mail by carriers, the sale of stamps, the registration of matter and sale of money orders," as it had done when located at No. 156 East Fifty-fourth Street, previous to being removed into said Industrial Building, "while the distribution department had charge of the distribution of second, third, and fourth class matter"; that "after the equipment of Industrial Branch Station, second class mail matter mailed by publishers and originating north of Fourteenth Street was mailed at that station"; that "this mail matter had previously been mailed at the general post-office and at Station O, at which points the distribution had theretofore been made and dispatch made to the several railroad stations, as specifically stated in the advertisement"; that "thereafter no further such mailing of second class matter was made at Station O, and all dispatches of said mailed matter for the West and New England States, and to and from Grand Central Station, were made from the Industrial Branch Station, a distance of approximately 6 blocks, instead of from the general post-office, 3½ miles distant and from Station O, 1¾ miles distant, as theretofore"; and that "the congested state of the general post-office on account of lack of adequate space, for the remedy of which Station O had been established some years before was well known for some time prior to the advertisement and proposal for this service." (*R.* 25–26.)

XVI. This Finding discloses the fact that the advertisement issued by the Post-Office Department for the purpose of advising bidders as to the amount

of service likely to be required, "inadvertently stated the service in operation August 15, 1892, between the Manhattan Elevated Railroad Stations and the general post-office and certain branch post-offices, at but one-half the number of trips actually required. Consequently, the claimant was required to and did perform the number of trips which were actually performed theretofore, but which were double the number thus specified"; that this additional service was done under protest the same resulting in 181,728 extra trips, which, including the foot service of delivering the mails into the railroad stations, was reasonably worth $14,538. (*R.* 26–27.)

Findings seventeen and eighteen we here give in full:

XVII. "The 'foot service,' for which extra compensation is claimed, consisted in carrying the mails up the stairways and delivering them to the Manhattan Elevated Railroad Company, at the stations on said elevated railroad nearest to the several mail stations, namely, Stations D, F, H, Y, K, L, J, W, G, E, O, and V. Claimant performed this 'foot' stairway service under protest, as being service not included in its contract, and said extra service so required and performed during the term from July 1, 1893, to February 6, 1895, necessitated 479,875 trips—a trip consisting of either going up or coming down said stairways, waiting until the arrival of the train, and making delivery of the mail to the messenger on the train; said designation 'trip' being irrespective of the number of bags contained in any particular mail, or the number of men required to carry it. This service required the employment by claimant of additional men at each said station.

"If the claimant is entitled to recover for this service, a fair and reasonable compensation therefor

will be the sum of $14,300 in addition to the amounts set forth in Findings XIII and XVI." (*R.* 27.)

XVIII. "Said elevated-railroad stations were not situated on the surface of the streets, but were at the same elevations as the railroad tracks, and could only be reached by ascending the steps from the surface of the streets provided and used for that purpose. Prior to the commencement of claimant's term of service it had been customary for the contractor generally to exchange the mail with the Government's messengers on the platform of the station at the door of the car.

"Upon the commencement of the claimant's term of service it did, without protest, begin the performance of the service between the general post-office and the Manhattan Elevated Railroad station at Park Place, and between postal branches O, E, G, W, J, D, F, H, and K, and the Manhattan Elevated Railroad stations at indicated streets, by the continuation of the method of such performance theretofore used under permission of the preceding contractor, namely, by messengers without wagons or carts in some cases and by carts in others. Subsequently, in accordance with the manner adopted by the claimant as above stated, the Department formally authorized, by order, its performance in push carts.

"Thereafter, at the request of claimant, permission was given allowing performance of a portion of said service by messengers without carts or wagons.

"The performance of the service thus referred to included the carriage of the mail up and down the stairways to and from the elevated stations, and no protest as to any portion of it was made by the claimant until mention was made of it in its letter received at the Department January 30, 1894.

"During most of and the latter part of the term of contract next preceding that of the claimant, and at the time of the issuance of the advertisement and the

submission of claimant's proposal, the previous contractor had been required to and did perform this like service up and down the stairs to all elevated stations from all postal stations at which this service was then required. At certain terminal stations where the mails were heavy the postal employees, under instruction, assisted the contractor's employees in order to facilitate the dispatches, but in nowise to assume such service on the part of the Government." (*R.* 27, 28.)

Upon these Findings of Fact, the court found, as conclusions of law, that for the extra mail messenger services from the Industrial Building, including the $9,950.22 expended for extra tolls, as found in Finding XIII, claimant should recover the sum of $68,483; and for the extra services in carrying the mails to the elevated railroad stations (Finding XVI), should recover $14,538; or, in all, $83,021. (*R.* 28.)

The court disallowed the claim for the "foot service," described in Finding XVII. (*R.* 28.)

ASSIGNMENT OF ERRORS (No. 52.).

The court below erred:

1. In finding and holding that the contract provision "to take the mail from and deliver it into the post-office, mail-stations, and cars" (*R.* 8), required claimant to take the mail despatches out of the mail wagons on the street surface, to then carry them, by foot-messengers, up the stairways of the several (named) stations of the elevated railroad, and to then and there, and in that manner, make deliveries thereof into the cars of the elevated railroad, (*R.* 32); whereas said contract was, in express terms, "a covered regu-

lation wagon mail messenger, transfer, and mail station service," and not only did not contemplate or require the carriage of the mails by a foot-messenger service, but the provisions thereof expressly directed and required that "all service shall be performed in regulation wagons, unless otherwise mentioned in statement of route (*R.* 6, 19, *etc.*).

2. In finding and holding, as conclusion of law, that claimant should not recover for the services (just referred to) set forth and described in its Findings of Fact, numbered XVII and XVIII. (*R.* 27–28.)

NOTE: The Government has omitted and failed to file, or set forth in its brief, an Assignment of Errors, upon which it relies herein. Counsel for claimant, therefore, are here unable to do more than refer and reply to the several propositions and contentions urged in said brief on behalf of the Government.

ARGUMENT.

I.

THE DISTRIBUTION STATION

Counsel for the Government insist that the service to and from this station was "new or additional service" of the kind described in the contract, and that no award should have been made therefor.

Upon this point there is persistent confusion in the statement of the facts appertaining to the Government's use of the Industrial Building. There were two separate and distinct stations in that Building, to wit, Station H and Distribution Station. Each station performed a function and service quite separate from the

other. Station H had formerly been located at 156 East 44th Street; it was simply an ordinary mail station, or branch post-office. (These terms, as used in the Post-office Department, and defined by the Court of Claims, are synonymous. Knox *v.* U. S. 30 *Ct. Cls.* 77.)

There was no change in the kind of service connected with Station H after its removal to the Industrial Building. In the language of appellant's brief, it "continued the collection and delivery of mails by carriers, the sale of stamps, the registration of matter, and sale of money orders." (*R.* 26.) It was located in the Industrial Building May 1, 1893. The general services in New York City under the contract embraced in this suit, did not commence until July 1, 1893, and the distribution service under the order of August 23, 1893, was not commenced until October 25, 1893. Hence Station H was located in the Industrial Building for about six months before any distribution station was established there. At least during that time it continued simply a branch post-office. This the Government states in its brief:

"Before and after the removal of Station H, as above stated, it was in all respects a branch post-office, etc." The Government also admits that after the distribution station was so established, "Station H continued the collection and delivery of mails by carriers, the sale of stamps, the registration of matter, and sale of money orders, while the distribution department had charge of the distribution of second, third, and fourth class matter." (*R.* 26.)

It is evidently important to the argument of appellant that the so-called Distribution Station and Station

H should be considered as one station, and that station be known as *Station H*. To this end is the attempt to confuse the names by alleging that the Distribution Station was known by several other names, among which were "Station H (distribution department)." To the same purpose, counsel declare, in their brief, that the two stations were on the same floor of the Industrial Building, "and were at all times connected by a passage way." Also, that "The collectors for Station H proper carried their collections of mail directly into and deposited them in the distribution department, and the distribution for dispatch and the assortment for city delivery were made there." (*R.* 26.)

How can any one, or all three of these things, change the official designation of the Distribution Station, or affect in the least the service required there?

The other admission (found in the same paragraph of appellant's brief and in the same Finding of the court from which we have quoted (*R.* 26) quite disposes of the whole matter: "The former (Station H) was in charge of a superintendent of station" (as all mail stations were), "and the latter" (Distribution Station), "was, until January 5, 1895, under the direction of an assistant of the superintendent of mails of the general post-office."

This makes it entirely clear that, at the time the Distribution Station was established, the postmaster-general and the city postmaster did not understand that they were establishing a new branch office, or adding an ordinary service to one already established. Here was to be performed one of the functions of the city post-office, and it was very properly put under the charge of an important official of that office. It

chanced to be located in a building where there was an ordinary branch office; and it further chanced that there was a passage-way between the rooms occupied by these two stations, which might have been there when the building was constructed years before it was thus occupied. Neither does the fact that collectors of mail for Station H dumped their loads and assorted them in the larger room of these two stations, in any way aid appellant's contention.

The first official order looking to the establishment of Distribution Station (*R.* 22) fixes the name and exact character of the station. The court will remember that the contract the petitioner signed, obligated it to perform *three* separate services, during the required period, in the City of New York: *First*, the "mail messenger service" which consisted entirely in carrying the mails from the city post-office to certain railroad stations and steamboat landings, and carrying the mails from these stations and landings to the post-office; *Second*, the "transfer service" which consisted solely in carrying the mails between the various railroad stations and steamboat landings; and *Third*, "mail station service," which required the contractor to carry the mails between the city post-offices and elevated railway stations.

Keeping these distinctions in view, it will be seen how important, for a full understanding of the matter, is the order of the Second Assistant Postmaster-General embodied in Finding VIII (*R.* 22), and which establishes the service at Distribution Station. The order is addressed to the contractor, and reads as follows:

"Post-office Department, Office of Second Assistant Postmaster-General, Railway Adjustment Division.

Washington, D. C., August 22, 1893.

"Sir: You are informed that the following order has this day been made on route No. 207,003,—covered regulation-wagon service at New York, N. Y.:

'From September 1, 1893, require contractor to perform additional mail-messenger service for the supply of *distribution station*, Forty-fourth street and Lexington avenue, as per following statement, or more frequently if necessary, without additional pay, in accordance with the terms of his contract.'

"The statement referred to in the above order is inclosed herewith.

"Very respectfully,

"J. LOWRIE BELL,

"*Second Assistant Postmaster-General.*

"UTAH, NEVADA, AND CALIFORNIA STAGE CO.,
E. J. TRAVIS, President, No. 525 E. 15th Street,
New York, N. Y."

Immediately following this formal order, and really a part of it, is the schedule or statement of services, furnished by the department. The heading of this schedule is: "*Additional mail messenger service.*" In the schedule the name of the station is also repeated as follows: "to the *distribution station*, 44th St. and Lexington Ave., from the following-named railroad stations."

The law providing for branch post-offices is found in Sec. 3871, R. S. U. S., as follows:

"The Postmaster-General, when the public convenience requires it, may establish within any post-office delivery one or more branch offices for the receipt and delivery of mail-matter and the sale of stamps and envelopes; and he shall prescribe the

rules and regulations for the government thereof. But no letter shall be sent for delivery to any branch office contrary to the request of the party to whom it is addressed."

This section of the Revised Statutes was defined and interpreted in Knox *v.* U. S. (30 *Ct. Cl.* 77.)

The law here cited, by implication at least, prohibits the Postmaster-General from establishing "within any post-office delivery" any stations for the relief of the public, or other purpose, except the branch offices named. There is no provision for distribution stations; neither is there any provision of law for establishing more than one post-office "within any post-office delivery." The Postmaster-General has no power to do so.

The foregoing must definitely settle the question of the character of the distribution station. It was not a mail station or branch post-office. The service established there was "Mail Messenger Service," and mail messenger service meant carrying the mails back and forth between the city post-office and the railroad stations and steamboat landings, and from one railroad station, or steamboat landing, to another railroad station or steamboat landing. That is a specific part of the contract. Therefore, all argument on behalf of appellant, based on the claim that Station H and distribution stations were one, and the service added by the order of August 22, 1893, was simply additional "Mail Station" service, must fall.

Then if this new service from and to the Industrial Building is not "new and additional *mail station* service," is it properly "new and additional *mail messenger* service"? It must not be lost sight of

that the advertisement, including "Instructions to Bidders," is a part of the contract. In this advertisement the three services required are clearly set out. Mail Messenger Service is confined to carrying the mails in the "Regulation Wagons" between only three classes of places—the city post-office, railroad stations, and steamboat landings. The distribution station is not and was not a railroad station, nor a steamboat landing. It can only be brought within the Mail Messenger Service by designating it as a a city post-office.

WAS DISTRIBUTION STATION A CITY POST OFFICE?

Counsel for appellant have recognized this weakness in their case, and undertake, in a somewhat feeble way, to argue to the court that the new station *was* a post-office. The first paragraph of their brief, under the heading, "Upon the Facts," p. 11, reads as follows:

"The advertisement provided that the contractor would be required to perform, without additional compensation, any and all new or additional service that might be ordered at any time during the contract term, whether between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations established at the time of the advertisement or that might be established thereafter, whether caused by the *establishment of new or change of site of existing post-offices*, railroad stations, steamboat landings, or mail stations within the city of New York, etc. (Rec., pp. 17, 18.)

"This became a part of the contract, and the con-

tract further provided that the contractor should perform all new or additional service of the kind named in the advertisement. (Rec., p. 7.)"

On p. 15 of said brief, we have the following:

"The advertisement warned bidders that the contractor would be required to perform all new or additional service between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations now established or *that may hereafter be established, whether caused by the establishment of new or by change of site of existing post-offices*, railroad stations, steamboat landings, *or mail stations*, within the city, *or caused by the alteration of the route made necessary by any other reason.*"

In these quotations the italics are those of opposing counsel. If these italics mean anything, they must mean either that the Distribution Station was a new post-office—or its equivalent. It would seem that the argument turned on the fact that the word in the advertisement was used in two places in the plural, to wit, *post-offices*. But the advertisement which was issued September 15, 1892, and forms a part of the contract, related specifically to eleven other cities than New York. Necessarily, in speaking of the post-offices in these cities generally, the plural had to be used. In both places where counsel set out the italicized quotations, the words are taken from the advertisement, and the word *post-offices*, so used, means simply the post-office at Boston, the post-office at Buffalo, and the other post-offices at the various cities mentioned. It is true that the word is used in the

plural in one sentence in the contract (*R.* 8, par. 2), but this is evidently an inadvertence. At two other places in the contract, the word is used in the singular (*R.* 9). It could not at the time the contract was executed be properly used in any other way. There was then but one post-office in New York City, and no person, bidder, contractor, or contractee, had ever considered the possibility of more than one post-office in any one town or city.

Therefore, the attempt to prove that the contractor was obligated by this agreement to deliver the mails at the Distribution Station because it was *a new post-office*, is an abandonment of the claim that the added service there was simply an extension of the *mail station* service. It is also in line with our own contention that the Distribution Station was *virtually* the establishment of a new additional post-office in the city.

Thus counsel for appellant, first insists that Station H (including what they are pleased to call "a distribution department," was a mail station in every sense of the term, and, therefore, clearly within the language of the contract." Then, as a second proposition, it is argued that the Distribution Station is within the provision of the "Instructions to Bidders," wherein the contractor is required to perform, without additional compensation, any and all new or additional service that may be ordered "*whether caused by the establishment of new, or by change of site of existing post-offices.*" These propositions do not harmonize. In our opponent's contention the Distribution Station must either be a "mail station in every sense of the word," or it must be *a new post-office.* It cannot be both. And the

service required at the new station must either be "Mail Station Service" or "Mail Messenger Service." Again, it cannot be both.

WHAT WE CLAIM ON THIS POINT.

1. The Distribution Station was, for all essential purposes relating to the mail messenger service, an additional post-office in the City of New York.

2. That its establishment practically doubled the mail messenger service indicated by the contract.

3. That such extraordinary service could not have been in the mind or contemplation of the contractor and was not in fact covered by the contract.

By reference to the order of August 22, 1893, it will be seen that the station in question was to be used as a gathering place for the heavy and bulky mail which had theretofore been gathered in the city post-office, and the contractor was required to haul this mail to the railroad stations and steamboat landings exactly as it was required in the contract to perform similar messenger service from the city post-office.

The "mail messenger service" for the city of New York, found on pp. 14 and 15 of the advertisement, shows by computation that the aggregate of all the "runs" for the year for that service exclusively, would be 393,471.82 miles. At that rate the total mileage for such service for the 15½ months covered by the suit would have been 508,232 miles. The court in Finding XI (*R.* 24) gives the increase of messenger service by reason of the order of August 22, 1893, at 311,939 miles In Finding VI it is shown that the advertisement notified bidders that the total service, in the transportation of the mails, *per annum*, would require, approximately,

973,674 miles, and that the probable annual increase would amount to 6,718; while in Finding VII it is found that between the date of the advertisement and the date when the contractor was to commence the service (July 1, 1893) additional service was required which increased the amount of annual mileage to 1,012,604 miles. Thus, in considerable less than a year, the service was increased 38,930 miles, or 32,212 miles more than the estimated increase for the whole year. At this rate of abnormal increase there should be added to the mileage made necessary by the order of August 22, 1893, *supra*, for the fifteen and one-half months covered by the petition, the further sum of 41,626 miles. Adding this latter amount to the whole increase made by said order, we have a total extraordinary increase of mileage for the time in dispute of 353,656 miles. This, it will be seen, is almost double the distance for which we contracted to carry the mails from the city post-office to the railroad stations for a whole year. In making the order in question, and thus abnormally increasing the service contemplated by the contract, it must be borne in mind that there was no diminution of the messenger service from the city post-office.

At this point we cannot state the question so well as it is stated in the opinion of the court. (*R.* 28.)

"That the services constituting the principal cause of action were in form 'new or additional,' but in substance a radical and extraordinary departure from the reasonable obligations of the contract. The very magnitude of the service exacted by the Post-office Department changed the service in kind and character. In form it was 'new or additional'; in substance it was rendered for a new and different system of postal ad

ministration in the city of New York of such magnitude that it could have not been anticipated or foreseen by the most prudent and experienced business man who proposed to bid for the service or enter into the contract. It was service different in kind and character because it was incidental and consequent to the introduction of a condition into the city postal service which had never been there before—the establishment of a new post-office system."

On March 3, 1893, some 70 days after the contract in this case had been executed, Congress provided in the post-office appropriation act, as follows:

"For rent, light, and fuel for the first and second class post-offices, eight hundred and two thousand dollars: Provided, That of said sum, thirty-five thousand dollars may be used for the rent, light, fuel, and necessary fixtures and furniture of additional premises in the city of New York hereby authorized to be hired and used for general post-office business in said city." (27 *Stats.* 732.)

Subsequently, and apparently resulting from this legislation, the Department rented the Industrial Building, and made the order of August 22, 1893 (*supra*) establishing the so-called Distribution Station. The building (provided by the act) was to be used for "general post-office business," *i. e.*, for such business as the general post-office was then doing. Had this law been in existence at the time our bid was made, or at the time the contract was signed, it would have given the bidder, or the contractor, no notice whatever of any probable increase in the service.

While it is probably true that the postal business

had so outgrown the capacity of the general post-office that it was seriously congested, and an enlargement of the building, directly or indirectly, was greatly needed, yet it would not have occurred to the mind of the contractor that the postal authorities would undertake such relief by establishing a second post-office 3½ miles distant. The obvious intention of Congress was to secure more room adjoining or in the immediate neighborhood of the existing post-office building. And certainly, in any event, it could not have been contemplated that the embarrassments due to the congested condition of the existing office were to be relieved at the expense of the existing contractor.

If the post-office department, or if Congress, could establish such a station during the term of the existing contract, then any number of such stations could be established, and the services of the contractor indefinitely enlarged. For instance, if it had occurred to the Postmaster-General, after the service had been thus established in the Industrial Building, that it, too, had become congested, he might have established still another "distributing station" at any distance up town and have thus imposed another half million miles of "runs" on the contractor, and so on indefinitely.

All this results, as the Court of Claims has pertinently said, "in a new and different system of postal administration in the city of New York of such magnitude that it could not have been anticipated or foreseen by the most prudent and experienced business man who proposed to bid for the service or enter into the contract."

The *form* of the service, it is true, was exactly the

form provided in the contract and there known as *mail messenger service*, and in this way only could it be called "new or additional." It was not "new" nor "additional" as contemplated by the contract. Certainly there was no intention on the part of either party that these words should relate to any service except such "increase" as would grow entirely from the "increase" of business. But this was neither "new" nor "additional" by reason of any increase. It was simply a division of the existing service in such way as to practically double the work and expenses of the contractor. The meaning of the word "increase," as used in the contract cannot be misunderstood. There is no room for double meaning in this first sentence in the first paragraph of the contract: "To carry said mail, using therefor wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or *increase*, during the time of this contract, etc." (*R.* 7.) It would be monstrous if the words could be construed to give the Postmaster-General a *capricious* right to enlarge the service to be performed. But, as already stated, he may, under the contention of the appellant, exact the duplication of the messenger service to be performed to and from the city office, then he may triplicate it, and eventually ruin any contractor under the *form* of the contract.

This character of contract has been too frequently construed by the Court of Claims, and this court, to admit of such construction now.

In the Otis case (20 Ct. Cls. 326) the lower court used the following language concerning mail contract.

"In the construction of this contract the government can claim no other or more favorable rule than a private individual, and as it is well known that instruments of this character are prepared by the Post-Office Department, leaving to the contractor no choice as to form or phraseology, that construction must be adopted which is more to the advantage of the claimant. Authority for this is found in Noonan *v.* Bradley (9 Wall. 407), where the court said: 'If there were any doubt as to the construction which should be given to the agreement of the intestate that construction should be adopted which would be more to the advantage of the defendant, upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him, and on the further ground that when an instrument is susceptible to two constructions, the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."

That case was appealed to the Supreme Court and affirmed in 120 U. S. 115. The general discussion in the opinions rendered by each court as to the scope of this character of mail contract, sustains the interpretation which we now urge.

The Postal Laws and Regulations for 1893, Sec. 739, p. 300, under the title "Duties of Postmasters in Respect to Mail Messenger Service," provides that "Postmasters will instruct mail messengers in regard to the performance of their duties, provide schedules of arrivals and departures for their service, *allowing reasonable running time*," etc.

In Postal Laws and Regulations, 1887, p. 292, as a

note to Sec. 725, the department cites United States *v.* Hart, 1 Pet. C. C. 390, as follows:

"The act of Congress prohibiting the stoppage of the mail is not to be so construed as to prevent the arrest of the driver of a vehicle in which the mail is carried, when he is driving through a crowded city at such a rate as to endanger the lives of the inhabitants. (United States *v.* Hart, 1 Pet. C. C. 390.)"

In Finding XII the court, after stating the orders establishing the distribution station, fixing the runs therefrom and thereto, without diminishing the runs from the general post-office, and after giving the exact number of horses, wagons, men, etc., made necessary by said orders, further found:

"The orders resulted in such increased speed in carrying the mails from the Industrial Building to some of the railroad stations that in obeying them it was necessary to violate the city ordinances as to the rate of speed; it largely increased the wear and tear on the wagons; it injured and shortened the period of usefulness of the horses, some of them dying from overexertion in hot weather by reason of the fast driving made necessary by the short time allowed to make the various trips."

It must be assumed that the "cut and dried" contract was made on the part of the defendant in full knowledge of the provisions in the Postal Regulations as to allowing "reasonable running time," and of the decision in *United States* v. *Hart*. It must be further assumed that when the time was fixed for the runs the department knew that it was forcing the contractor to violate the laws of the city.

This gives forcible emphasis to the dictatorial and arbitrary methods of the Post-Office Department in dealing with contractors; and further warrants the construing of such contracts, as stated in the Otis case, favorably to the claimant.

If it is a correct rule that the Government can claim no more favorable construction of its contracts than a private individual might, it would, without intentional offense, be proper to allege that to claim immunity from the payment of damages under the facts found would be an impertinence.

The whole of the argument concerning this point, is clearly stated in the opinion. Rec. 28 *et seq.* To this we beg the attention of this court, and submit that the judgment for $68,483, for services rendered in connection with the Industrial Building, should be affirmed.

II.

Extra Service in Carrying the Mails from Stations F, H, Y, K, W, G, E, and O, to Nearest Manhattan Elevated Railroad Station not Embraced in the Advertisement or Contract.

This item, for which recovery was sought by claimant, and allowed by the court below, is thus stated in the Findings of Fact.

XVI.

"The advertisement issued by the Post-Office Department, under date September 15, 1892, inviting proposals for covered regulation wagon mail messen-

ger, transfer, and mail station service which was made a part of the contract between defendants and claimant, undertook to give a schedule of the service in said city as the same existed and was in operation on August 15, 1892, as stated in said advertisement, 'so that bidders may be as fully advised as possible of the amount of service likely to be required.'

"The advertisement above named inadvertently stated the services in operation August 15, 1892, between the Manhattan Elevated Railroad stations and the general post-office and certain branch post-offices at but one-half the number of trips actually required. Consequently the claimant was required to and did perform the number of trips which were actually performed theretofore, but which were double the number thus specified.

"Claimant performed said additional service, under protest made in January, 1894; and in thus carrying the mails from mail stations F, H, Y, K, W, G, E, and O, to the nearest elevated-railroad stations, and from these latter stations back to the said mail stations, from July 1, 1893, to the commencement of this suit, to wit, February 6, 1895, it made 181,728 trips, for which extra service a fair and reasonable compensation, including the foot service of delivering the mails into the railroad stations, is the sum of $14,538." (*R.* 26–27.)

As is known, the Manhattan Elevated is a double-track railroad, its trains running in both directions, uptown and downtown, and the trains, in each direction, stop at each station; so that, at each such station, there is, on opposite sides of the tracks and street, a separate station, one for the uptown, the other for the downtown, trains.

The mail deliveries required of claimant were to and from each side of the several Elevated Railroad stations; whereas, the advertisement and contract, as

above, in fact, indicated and called for but one side. Claimant, however, was required to deliver to and from both sides, up and down, thus exactly *doubling* the service embraced in and called for by both advertisement and contract.

In the brief on behalf of the Government, it is sought to overcome the finding and judgment of the court below, in favor of claimant, as to this item, by the decisions heretofore rendered in Burgwyn *v.* U. S. (34 *Ct. Cls.* 348) and Simpson *v.* U. S. (172 *U. S.* 372); neither of which cases, it is submitted have any material or controlling bearing upon the question involved herein.

In the Burgwyn case, the Government advertised for proposals for dredging in, and removing logs and stumps from, the Cape Fear River, below Wilmington, North Carolina. The specifications contained the following:

"It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings and are invited to make the estimate of quantities for themselves."

The maps of the shoals, showing soundings, depths, and other data in the office of the engineer officer in charge, were open to the inspection and verification of bidders, including claimant. It seems that certain arithmetical errors relating to quantities of material to be excavated were contained in the specifications, the same resulting in an underestimate by claimant of the cost of work; but these errors were discovered

prior to the opening of the bids, and were made known to all the bidders, including a representative of the claimant, who was then and there present, but he did not withdraw or change the bid on account thereof.

In the contract, it was mutually agreed that the work should amount to *not less* than $125,000, *nor more* than $140,000; and the claimant was paid and accepted said maximum sum without objection or protest that he expected or intended to claim any additional sum of money on account of said work.

Under these facts, the Court of Claims held that claimant could not recover; and it is difficult to see how any other conclusion could have been there reached.

In the Simpson case, contractors engaged to build a dry dock at the Brooklyn Navy Yard, and, in the doing of the work, it was discovered that a "sand stratum" underlay the area of the site, by reason of which contractors were put to additional expense.

The specifications, made part of the contract, provided that the dock was to be built upon a site which was "available"—that is, a site to be selected in the discretion of the Government suitable for the erection of a dry dock.

That the site so selected was, in fact, "available," was not open to controversy or question, since the dry dock was actually erected thereon by the contractors, although at a greater cost than they had anticipated, or than if the underlying soil had been stable and contained no quicksand.

Furthermore, the contractors performed the work to completion, received and accepted payments therefor, until and including the last, without ever assert-

ing any claim for extra compensation. The last payment and final receipt passed between the parties June 17, 1890, and it was not until April 11, 1893, that the claim for extra compensation was first presented.

Under the facts in that case, it was held that claimant could not recover.

The present case, however, involves a very different situation of fact.

The court below, in its opinion, has well summed up the situation involved in this case, and from which we quote, as follows:

"There is a second cause of action, founded upon misinformation given to the contractor when the bid was made and the contract executed.

"The advertisement for proposals represented that there were two stations on an elevated street railroad in the city which were each served, going and coming, by 62 trips of daily mail-messenger service. In fact, there were just double that number of stations, and the business existing required just double the alleged number of trips. In the case of Burgwyn (34 *C. Cls. R.* 348), which was relied upon by the defendants, the decision rested upon the fact that the information which the contractor needed (the soundings of a channel which he was to dredge) was equally within the reach of both parties. In this case the information was peculiarly within the possession of the defendants. They knew, and were supposed to know, and must have known, to how many of these elevated railroad stations the mails were then carried. True it is that the advertisement declared that the bidders must inform themselves, and that no additional compensation would be allowed for mistakes, and that they must seek the postmaster for explanations. But here was an instance where the bidder might inform

himself by reading with care the statement which the Department placed in his hands; and it was not a case which required the bidder to seek the postmaster for explanations, for nothing could be plainer than that which was stated; and it was not a case of mistake, for the matter was understood precisely as it was written. A trivial error, such as saying that there were thirty stations when in fact there were thirty-one, might be called a mistake; but here there was no trivial error, but a plain misrepresentation of 100 per cent.

"The purpose of the advertisement was to attract bidders and invite competition; and when the Department, to invite competition, volunteered to give bidders specific information of existing conditions within its own knowledge, and not within the knowledge of the bidders, it was bound to give them information upon which they could rely. For the court to hold that such information so volunteered might be worthless and, as in this case, delusive, would be to warn all prudent persons out of the competitive market and thereby destroy effective competition. The court is of the opinion that the representation made by the Department in this matter of these elevated railroad stations must be deemed in the nature of a warranty."

In the brief on behalf of the Government, as has been above alluded to, attempt is made to liken the facts involved in this case to those in the Burgwyn and Simpson cases (*supra*), and to assert that claimant had no right to rely upon the statement contained in the Instruction to Bidders, and in the Contract as being in the nature of a warranty of the character and quantity of work to be required, so far as this branch of the service is concerned; and it is also pointed out, in said brief, that investigation and inquiry by claimant would have disclosed that the

same service was performed by a previous contractor, and was being performed at the time of the advertisement.

Such argument, however, is really quite aside from the real question here involved: It is quite immaterial whether some previous mail contractor did or did not perform all of the service embraced in this item, or whether part of the service, to wit, that included in the advertisement, was performed by one contractor, and that not so included therein performed by another contractor. The Government advertised for proposals for performing a particular subject-matter, namely, the service advertised, and none other. Therefore, it will not do to say that an invitation for proposals covering a specific subject-matter, to wit, to perform a *designated* mail service, is not a warranty by the Government that that is the service upon which bids are requested; and that, merely because of inadvertence and mistake it had omitted to advertise a service just double in amount that so specified; and that claimant, though himself without fault or notice, had no right to rely upon the service actually advertised, but must be held to perform the *double* service without additional compensation.

To so hold would be to absolutely ignore the fundamental principles underlying all contracts, and would not only find no support under the decided cases, but would be in defiance thereof.

It is respectfully submitted that the court below did not err in its conclusion of law and judgment in favor of claimant, in respect of this item of claim.

III.

The claim for services in carrying the mails up and down the stairways at elevated railway stations, the court disallowed.

The facts found by the court in Finding XVII (Rec. 27) disclose that a very large amount of foot service was performed by claimant at the order of the Post-Office Department, but under protest. The court finds that the service required 479,875 trips *up* and *down* the various stairs, a trip consisting in either going up or coming down the stairs with mail; that "this service required the employment by claimant of additional men at each said station"; and, if claimant was entitled to recover, a fair compensation would be $14,300. This court will note that that would be at the exceedingly low rate of about three cents a trip.

The Finding further discloses that there were 12 of these elevated stations. Trains were run both ways at each, and on a rapid schedule. One set of foot messengers could not care for the mails going both ways. Messengers were necessarily kept to carry to and from the trains going up town, and another set to carry to and from those going down town. With the long hours within which the mails were transported on these roads each day, the minimum requirement for the service would be 4 messengers at each station. This would necessitate the employment by the claimant of 48, or, in order to be within the lines of safety, say 50, extra men. These, necessarily, being intrusted with the mails, and having to carry heavy sacks, had to be laborers of a high order, morally and physically. Their compensation could not be less

than 10 or 12 dollars per week. Putting it at $10 the weekly payroll would be $500. The service covered from July 1, 1893, to February 6, 1895, a total of over 80 weeks in all. That imposed the large expenditure of over $40,000 for this character of service.

In this connection the subject-matter of the contract is most important. This is clearly set out in the advertisement and repeated in the formal contract. The employment was for carrying the mails of the United States in the *covered regulation wagons* prescribed by the Department, "being covered regulation wagon mail messenger, transfer, and mail station service." Advertisement, Exhibit "A," Rec. 5. This language of the advertisement is repeated in the contract as follows: "The Utah, Nevada, and California Stage Co., by E. J. Travis, President, has been accepted as contractor for transporting the mails on route No. 207,003, being the covered regulation wagon mail messenger, transfer, and mail station service at the city of New York, N. Y., under an advertisement issued by the Postmaster-General on the 15th day of September, 1892, for such service, and which advertisement is herewith referred to and made by reference a part of this contract." Rec. 7.

The first covenant of the contractor and his sureties is "to carry said mail, using therefor wagons, of the kind hereinafter described, in sufficient number to transport the whole of said mail whatever may be its size, weight, or increase during the term, &c." The size of the wagons to be used, the material, method of construction, finish, color, ornamentation, number and kind of doors, the kind of hinges on which they must be hung, the kind of locks with which they must

be fitted, how the driver's seat must be fashioned, trimmed and finished, including his foot rest, are all minutely set out in the contract; which further discloses that lithographs and drawings accompany the contract. In a word, the service was as provided by the contract *exclusively a wagon service.* The provisions of the contract exclude any thought that more than one man should be employed with team and wagon to transport the mails from any given point, to any other given point. There was to be one driver, whose uniform was prescribed; no person was to be allowed to ride inside the wagon; the driver must carry on the driver's seat, whenever necessary, one railway post-office clerk, substitute, or messenger. It is also provided by regulation of the Department that the mails are never to be left unguarded. Postal Laws and Regulations, 1893, p. 300. Not a word relating to foot messengers, either as to numbers, duties, or uniforms.

As thus pointed out, the service contemplated and required by both advertisement and contract, was a *wagon* service. In practice, however, delivery to a railroad was made by the drivers. But the driver was not to leave or abandon his wagon.

That the practice in this regard, as well as the construction of a contract relating to wagon service and providing that "mail shall be taken from and delivered into the cars," has been, during past years (including the period involved in this suit), and now is, as contended for by claimant. This is conclusively shown by orders, rules, and regulations, promulgated by the Department itself.

Take for example Sec. 1198, Postal Laws and Regulations (1902), wherein it is provided:

"Railroad companies will be expected to place their mail cars at points accessible to mail messengers or contractors for wagon service. If cars are not so placed, the companies will be required to receive the mails from and deliver them to the messengers or contractors, at points accessible to the wagons of the messenger or contractor."

And, again, Sec. 1255 (*id.*) provides, that mail messengers shall receive the mail from and deliver into the post-office mail cars and on board steamboats, *when such cars or boats are accessible;* and when not so accessible, shall be delivered to the railroad or steamboat employees at *nearest accessible point.*

And, finally, attention is asked to printed departmental circular letter, from which, so far as here material, the following is quoted:

"RAILROAD SERVICE.

"POST-OFFICE DEPARTMENT,

"SECOND ASSISTANT P. M. GENERAL,

"WASHINGTON, D. C., *February* 2, 1900.

"SIR: Referring to yours of the 1st instant, quoting from the instructions issued by the Second Assistant Postmaster-General, under date of March 15, 1894, as follows:

* * * * * * * *

'It is the duty of railroad companies, in places where the Department has regulation or screen wagon service, to either place their mail cars at a point where they will be accessible to the mail wagons, or cause their employees to truck the mail between the wagons and cars, both ways.'

* * * * * * * *

"I have the honor to state that this office understands that these instructions are still in force, and sees no objection to their re-issue, as suggested by you. In fact, it seems advisable that all employees of the Department and railroad employees who are connected with the handling of the mails should have information on these points.

"Very respectfully,

"W. S. SHALLENBERGER,

"*Second Asst. Postmaster-General.*

"CAPTAIN JAMES W. WHITE,

"*General Superintendent, R. M. S.*"

By reference to the opinion of the Court of Claims (Rec. 32) where the court undertakes to furnish its reason for disallowing the claim for this foot service, it will be seen that the whole matter turns upon the word "into" found in the phrase of the contract—"to take the mail from and deliver it into the post-offices, mail stations, and cars.

The facts concerning this "foot service" are found in Finding XVII (Rec. 27). In Finding XVIII (*id.*) the court declares that "prior to the commencement of the claimant's term of service it had been customary for the contractor generally to exchange the mail with the Government's messenger *on the platform* of the station at the door of the car."

This shows very clearly that the word *into* did not mean, as finally found by the court, the actual putting of the mail bags into the cars. In fact the mail messengers never were required to do this. The regulation and instruction indicated in the above letter of General Shallenberger clearly shows this.

It is submitted, therefore, that the foot-messenger service so required of and performed by claimant, was not embraced within or required by either advertisement or contract; and that the same was an *extra* service, for which compensation should be made by defendant, at the fair and reasonable value thereof.

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